Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

GEORGE MEREDITH BISHOP, III,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a litigant that discovers after the trial that a juror who decided a case was statutorily disqualified have to also prove that the juror was biased against the litigant at the time of jury selection?

2. Is the hearsay statement of a now deceased bookkeeper that was relied upon by an expert witness and tax lawyer admissible under the Federal Rules of Evidence to show the bookkeeper's state of mind bearing on the question of intent of her employer, as a statement against her interest and as the type of information normally relied upon by a tax lawyer?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

STATUTES AND COURT RULES 1

STATEMENT OF THE CASE 2

1. Is it necessary to show bias when a statutorily disqualified juror lies about her status on two forms and in eight voir dire questions in order to be allowed to serve?

2. Was the statement of the now deceased bookkeeper of Petitioner that the mistake in not reporting all of Petitioner's income as inadvertent on her part and not the intentional act of Petition admissible under the Federal Rules of Evidence?

REASONS FOR ALLOWANCE OF THE WRIT 5

I. THE COURT OF APPEALS SHOULD HAVE REMANDED FOR A NEW TRIAL ONCE IT WAS DISCOVERED THAT A JUROR LIED ABOUT HER PENDING CRIMINAL CASE IN ORDER TO BE ALLOWED TO SERVE ON PETITIONER'S JURY

II. THE LOWER COURTS IMPROPERLY CONSTRUED THE FEDERAL RULES OF EVIDENCE IN ORDER TO DISALLOW THE STATEMENT OF PETITIONER'S NOW DECEASED BOOKKEEPER TO PETITIONER'S TAX ATTORNEY CALLED AS AN EXPERT WITNESS

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Coughlin v. Tailhook Assn., 112 F.3d 1052 (9th Cir. 1997) 6

Dyer v. Calderon, 151 F.3d 970 (9th Cir. 1998) 6

Green v. White, 232 F.3d 671 (9th Cir. 2000) 6

McDonough Power Equip. Corp. v. Greenwood, 464 U.S. 548 (1984) 5, 7, 9

Peco Energy Co. v. Boden, 64 F.3d 852 (3rd Cir. 1995) 8

Phoenix Mut. Life Ins. Co. v. Adams, 30 F.3d 554 (4th Cir. 1994) 8

Smith v. Updegraff, 744 F.2d 1354 N. 7 (8th Cir. 1984) 9

United States v. Baird, 29 F.3d 647 (D.C. Cir. 1994) 8

United States v. Bishop, 264 F.3d 535 (5th Cir. 2001) 1

United States v. Boyce, 849 F.2d 833 (3rd Cir. 1988) 9

United States v. Collins, 78 F.3d. 1021 (6th Cir. 1996) 7

United States v. Elkins, 885 F.2d 775 (11th Cir. 1989) 8

United States v. Humphreys, 982 F.2d 254 (8th Cir. 1992) 7

United States v. Langford, 990 F.2d 65 (2nd Cir. 1993) 7

STATUTES

28 U.S.C. §1254(1) 1

28 U.S.C. §§1861-1871 1

28 U.S.C. §1865(b)(5) 2, 7

TABLE OF AUTHORITIES – Continued

Page

RULES

Fed. R. Evid. 703 ..... 1, 8, 9

Fed. R. Evid. 803(3) 1, 7, 9

Fed. R. Evid. 804(b)(3) 1, 8, 9

Sup. Ct. R. 10 1

MISCELLANEOUS

H. R. Rep. No. 1076, 90th Cong., 2nd Sess., 1968 U.S.C.C.A.N. 1792 6

PETITION FOR A WRIT OF CERTIORARI

George M. Bishop, hereinafter "Petitioner," respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals in *United States v. Bishop* is reported at 264 F.3d 535 (5th Cir. 2001) (Pet. App. 1). The opinion of the district court denying Bishop's Motion for New Trial on the basis that a statutorily disqualified juror lied about her criminal history in order to be allowed to serve as a juror is unreported. (Pet. App. 2).

JURISDICTION

The judgment of the court of appeals was filed on August 30, 2001. The timely Petition for Rehearing was denied on October 15, 2001. (Pet. App. 3). This Court has jurisdiction based upon 28 U.S.C. §1254(1) and Rules 10(a) and (c) of the Rules of this Court.

STATUTES AND COURT RULES

Pertinent parts of the Jury Selection & Service Act of 1968, as amended, 28 U.S.C. §§1861-1871 (Pet. App. 4), Federal Rules of Evidence 703, 803(3) and 804(b)(3) (Pet. App. 5, 6 & 7), and pertinent parts of the House Report of

the Judiciary Committee concerning the intent of Congress in passing the Jury Selection & Service Act of 1968 are in the appendix. (Pet. App. 8).

STATEMENT OF THE CASE

False Statements By A Juror In Order To Be Seated

A juror that was statutorily disqualified under 28 U.S.C. §1865(b)(5) was chosen to sit on Petitioner's jury because she falsely answered all of the questions submitted to her designed to inquire about her criminal background.

The juror, Jodi Tharp, had been under indictment in Harris County, Texas, since October 8, 1997, for stealing $42,250 from her employer. (Pet. App. 8). She entered a plea of guilty to the charges on October 13, 1997 in return for a sentence of deferred adjudication. She was placed on probation for ten (10) years while the charges remained pending and she made restitution. (Pet. App. 9 & 10).

The presence of the disqualified juror was not discovered until after the trial in which Petitioner was convicted of three counts of tax evasion. Petitioner filed a motion for new trial. Tharp was given immunity except for perjury in an order signed by the district court (Pet. App. 11), and then testified at a two-day hearing on May 16 & 17, 2001. After the hearing, the district court found that Tharp was disqualified from serving as a juror because her third degree felony theft charge remained pending while she served as a juror. (Pet. App. 2, pp. 5-6). The

court of appeals also found that Tharp was not a qualified juror. (Pet. App. 1, pp. 12-13).

The district court, however, determined that even though Tharp was disqualified and failed to respond truthfully to eight (8) voir dire questions, the juror information form and the juror questionnaire (Pet. App. 12), it had not been shown that she was biased against Petitioner at the time of her selection on the jury. (Pet. App. 2, p. 18). The court of appeals affirmed holding that there was no proof that Tharp "was partial to one side or the other." (Pet. App. 1, p. 13).

The juror questionnaire (Pet. App. 12) inquired as to whether Tharp had ever been a witness in court or had ever been charged criminally. She circled "no" in response to three questions relating to criminal charges or whether she had been a witness in either civil or criminal court. In fact, Tharp had been a witness in criminal court on October 13, 1997, when she entered her plea of guilty and testified about the schedule she could follow in making restitution. She had also been a witness in her Chapter 7 Bankruptcy on December 4, 1998 in Bankruptcy Court.

Before she appeared in response to the jury summons in this case in October 1999, Tharp filled out a juror information form in which she stated that she had not been convicted of a state or federal crime punishable by imprisonment of more than one year and had never been charged criminally other than with a traffic ticket (Pet. App. 13). At the hearing on May 17, 2000, Tharp admitted that she gave false answers to these questions (Pet. App. 14). Tharp also admitted at the hearing that she had given

false answers to eight (8) questions on voir dire each of which inquired about her involvement in criminal matters or past criminal charges. The Fifth Circuit found that the answers of Tharp did not create a "pattern of lies" as occurred in two recent Ninth Circuit cases both of which ordered a new trial. (Pet. App. 1, p. 12).

The Statements Of Petitioner's Now Deceased Bookkeeper To The Expert Witness Were Admissible

Before her death in February 1998, Petitioner's bookkeeper, Pat Schulmeier, was questioned about various bookkeeping errors in the years in question in this case, 1991 and 1994, by Petitioner's tax lawyer who was called as an expert witness at trial. The bookkeeper was accompanied by her own attorney at the meeting. Schulmeier admitted to Petitioner's tax lawyer, Marc Grossberg, that she made a mistake in recording the 1994 fee in question in this case and that her mistake was not the result of an intentional act by Petitioner.

Schulmeier was relieved as Petitioner's bookkeeper two months later and died unexpectedly of emphysema in February 1998, before the indictment was returned on March 24, 1999. At the trial, petitioner sought to introduce the statements of Schulmeier to rebut the allegations that the underreporting in 1994 as a result of these bookkeeping mistakes was inadvertent instead of intentional.

The proffer of testimony was made through Marc Grossberg, who qualified as an expert witness at the trial. The proffer was to show (1) Schulmeier's explanation that

she made a mistake in making the bookkeeping entries; (2) her state of mind at the time the fee in question was received, but not recorded in the general ledger; and (3) why only approximately half of the fee was reported to the accountant. The testimony was refused by the district court.

The court of appeals held that the statements being hearsay were not admissible because they were not an explanation of Schulmeier's then state of mind, but were recitations of her memory. (Pet. App. 1, p. 7).

REASONS FOR ALLOWANCE OF THE WRIT

The decision of the Fifth Circuit is in conflict with the decision of this Court in *McDonough Power Equip. Corp. v. Greenwood*, 464 U.S. 548 (1984). This Court in *McDonough* established a two-prong test to obtain a new trial if a juror conceals his background. The moving party must demonstrate that a juror failed to answer a material voir dire question honestly, and that a correct response would have been a valid basis for a challenge for cause. *Id.* at 556. This two-prong test was met when both lower courts found that Tharp gave false answers on both juror forms and falsely answered eight voir dire questions, any of which would, if answered correctly, be the basis of a successful challenge for cause for a statutory disqualification.

The lower courts, however, imposed a further requirement on Petitioner, requiring him to show that the juror, after being granted immunity by the government, was somehow biased against Petitioner at the time of jury

selection. This requirement is contrary to the holdings in other circuits, implying bias when jurors lie about their disqualification. *See Green v. White*, 232 F.3d 671 (9th Cir. 2000); *Dyer v. Calderon*, 151 F.3d 970 (9th Cir. 1998).

This additional requirement of showing that not only did the juror answer falsely about a material matter that would be the basis of a challenge for cause, but was biased, is contrary to the intent of Congress when it passed the Juror Qualification Act of 1968. Those excluded from jury service since 1968 were to be excluded on the basis of objective criteria only. H. R. Rep. No. 1076, 90th Cong., 2nd Sess., 1968 United States Code Cong. & Adm. News 1792, 1796 (Pet. App. 8). The statutory exclusion of a juror on the basis of an objective determination that the juror had a pending charge that could result in imprisonment for more than one year would preclude a further subjective determination of whether or not the disqualified juror was also biased. In fact, the House Report on this statute stated that it "embodies two important general principles: (1) random selection of juror names from the voter lists of the district or division in which court is held; and (2) determination of juror disqualifications, excuses, exemptions and exclusions on the basis of objective criteria only." H. R. Rep. No. 1076, 90th Cong., 2nd Session 1968 U.S.C.C.A.N. 1792, pp. 3 & 4 (Pet. App. 8, pp. 3 & 4).

The cases cited by the Fifth Circuit opinion requiring a showing of actual bias when a juror lies during voir dire are all cases in which a statutory disqualification was not shown to have been concealed by the juror. In *Coughlin v. Tailhook Assn.*, 112 F.3d 1052, 1061 (9th Cir. 1997), the juror's prior conviction that was concealed was

for a misdemeanor and the district court accepted the juror's claim that he misunderstood the relevant question. This did not occur in the instant case.

In *United States v. Humphreys*, 982 F2d 254, 261 (8th Cir. 1992), the juror was found to be acting under a good faith belief that his civil rights had been restored after being convicted 31 years earlier. There was no finding of a good faith belief by the district court in the instant case.

Finally, the juror in *United States v. Langford*, 990 F.2d 65, 68-70 (2nd Cir. 1993) had been convicted 15 years earlier of two misdemeanors that were not a basis for statutory disqualification under 28 U.S.C. §1865(b)(5) and the juror's explanation of these convictions was found to be credible, unlike the findings of the district court herein that Tharp's answers were false and unexplainable. (Pet. App. 2, pp. 17-18).

The instant case fits squarely into the two-prong test set out by this Court in *McDonough*, 464 U.S. at 556. The decision of the Fifth Circuit should be reversed and a new trial ordered as neither Congress nor this Court has required a showing of bias to obtain a new trial where a juror lies to conceal a statutory disqualification.

The opinion of the Fifth Circuit upholding the exclusion of the testimony of Petitioner's expert tax attorney, Marc Grossberg, was contrary to the clear intent of Fed. R. Evid. 803(3) (Pet. App. 6) which allows testimony that would otherwise be hearsay to show the state of mind of an unavailable declarant. The Fifth Circuit opinion also conflicted with rulings in other circuits that followed the intent of Rule 803(3), *e.g.*, *United States v. Collins*, 78 F.3d

1021, 1036 (6th Cir. 1996); *Phoenix Mut. Life Ins. Co. v. Adams*, 30 F.3d 554, 566 (4th Cir. 1994); *United States v. Baird*, 29 F.3d 647, 653-54 (D.C. Cir. 1994).

The testimony of the qualified expert witness, Grossberg, was also admissible under Fed. R. Evid. 703 (Pet. App. 5) as being relevant information concerning how the mistake in Petitioner's general ledger for 1994 was inadvertent which determined how much penalty Petitioner would owe to the I.R.S. This was information that would normally be relied upon by a tax attorney attempting to amend an incorrect tax return which was Grossberg's job at the time of his interview with Schulmeier, the bookkeeper for Petitioner. *See United States v. Elkins*, 885 F.2d 775, 786 (11th Cir. 1989).

Finally, the testimony of Grossberg regarding the statement she made to Grossberg during this investigation into the 1994 tax return before it was amended under his direction was admissible under Fed. R. Evid. 804(b)(3) (Pet. App. 7). Schulmeier's statement that the mistake in the bookkeeping was her fault and was inadvertent was contrary to the government's contention that the mistake was intentional and done at the request of Petitioner. This statement was so contrary to Schulmeier's pecuniary, proprietary or penal interest that a reasonable person would not have made it, unless she believed it to be true. The decision of the Fifth Circuit excluding Grossberg's testimony of what he was told in 1996 by the deceased Schulmeier about the mistake in the 1994 tax return conflicts with the Federal Rules of Evidence promulgated by this Court. The Fifth Circuit decision also conflicts with the decisions of other circuits that have interpreted Fed. R. Evid. 804(b)(3). *See, e.g., Peco Energy Co. v. Boden*, 64

F.3d 852, 859 (3rd Cir. 1995); *United States v. Boyce*, 849 F.2d 833, 836 (3rd Cir. 1988); *Smith v. Updegraff*, 744 F.2d 1354, 1366 N. 7 (8th Cir. 1984).

CONCLUSION

The petition for a writ of certiorari should be granted to correct the conflicts between the opinion of the Fifth Circuit and the opinion of this Court in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), the conflicts between the Fifth Circuit opinion and the opinions of the Ninth Circuit and the misinterpretation by the Fifth Circuit of Rules 703, 803(3) and 804(b)(3) of the Federal Rules of Evidence.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-20282

UNITED STATES OF AMERICA
Plaintiff-Appellee

-vs-

GEORGE MEREDITH BISHOP, III
Defendant-Appellant

Appeals from the United States District Court
for the Southern District of Texas

August 29, 2001

Before HIGGINBOTHAM and BENAVIDES, Circuit Judges, and LITTLE, District Judge.[1]

LITTLE, District Judge:

Today we consider George M. Bishop III's appeal of three convictions centered upon income tax and reporting violations. The first and third counts involve attempted tax evasion,[2] in the 1991 and 1994 tax years, respectively.

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[1] Chief Judge F.A. Little, Jr. of the Western District of Louisiana, sitting by designation.

[2] 26 U.S.C. § 7201.

The second count relates to knowingly filing a false income tax return, under penalty of perjury, for 1991.[3] Finding no reversible error, we affirm each conviction.

I.

The operative facts are not in serious dispute. During all times material to counts one, two and three, Bishop was the sole proprietor of George M. Bishop and Associates (GMBA), a law firm in Houston, Texas. In 1994, the Internal Revenue Service (IRS) initiated an audit of Bishop's account, because he did not file federal income tax returns for the years 1989, 1990, and 1991. Bishop explained the delay was caused by tensions in his marriage, leading to his divorce in 1991. Under the pressure of the audit and with the assistance of his accountants, Bishop filed the missing returns in August 1994, September 1994, and December 1994, respectively.

The audit continued because IRS employees suspected Bishop understated his income. In September 1995, Mark E. Locus, the IRS agent in charge of the case, received an anonymous letter suggesting that Bishop omitted a substantial fee he received in April 1991 from Harold Scharold, a client in a breach of contract suit. A review of Bishop's records showed that, on 5 April 1991, Scharold paid a $933,333.33 legal fee. The check was payable to GMBA, but was deposited in Bishop's personal account at Dean Witter. Joye Wilson, Bishop's bookkeeper, initially recorded the amount as fee income in the GMBA general ledger, in accordance with the normal

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[3] 26 U.S.C. § 7206.

office procedure. At Bishop's instruction, Wilson reversed the first ledger entry by debiting the account. GMBA's monthly profit and loss statements therefore did not reflect receipt of the fee.

Bishop did not report the fee either. His 1991 tax return stated that his gross income from the practice of law was $988,599.00. IRS agent Kay Campbell, Locus' successor, determined that at most, Bishop reported $352,945.81 out of the $933,333.33 fee he received from Scharold. The $352,945.81 included $140,000 which is the sum Bishop paid to his ex-wife and advised his accountant to add to his reported income, and $212,945.89 that Campbell could not attribute to other sources. Campbell also found that Bishop may have failed to report other income of $150,344.77, the total of amounts added to the GMBA general ledger during the last four months of the year but not included on Bishop's return.

Additionally, in August 1991, Bishop received a $183,666.67 fee plus $28,513.42 in litigation expenses, for representing the Cash children in a legal malpractice suit. Both sums were paid into Bishop's trust account. Bishop should have reported the $183,666.67 as income. During the week after receiving the money, however, he withdrew $111,120.59 from the trust account and deposited it in two personal accounts. He did not report any portion of this money as income. Accordingly, his total unreported income for 1991 was at least $841,822.80. Campbell recalculated Bishop's taxes for the year, making appropriate adjustments in Bishop's favor as well as adding the unreported income. Bishop's return reported a tax of $107,973.00, but according to Campbell, he actually owed

$358,002.00. There was an underpayment in excess of $250,000.[4]

Campbell also reviewed Bishop's return and records for 1994. Bishop filed his 1994 return in April 1995, reporting gross income from the practice of law of $676,262. In a matter settled during the year, Bishop received a $575,000 fee. One of the opposing lawyers paid Bishop a $400,000 portion of the fee. Bishop requested that the lawyer wire transfer the money to Bishop's personal account at Chappell Hill Bank. The lawyer refused to wire transfer the money, but did send the check directly to Chappell Hill Bank. Consequently, the payment was not recorded in the GMBA general ledger. Upon receipt of a Form 1099 regarding the $400,000 payment, Pat Schulmeier, Bishop's new bookkeeper, informed Bishop's accountant of receipt of only $196,006.74 out of the $400,000, for reasons that remain unclear.[5] A $10,000 check, which was a part of the $575,000 fee but from a different source, also was deposited at Chappell Hill Bank and omitted from Bishop's return. As a result, Bishop failed to report $179,532.41 to $213,993.26 of fee income received in 1994.[6]

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[4] This figure includes $10,247.00 in self employment tax. The rest is income tax.

[5] $196,006.74 may have been the portion of the $400,000 remaining after Bishop repaid a loan and sent $100,000 to his ex-wife.

[6] The checks for the remaining portion of the $575,000 fee were reported properly. Campbell could not determine the source of $34,460.85 of Bishop's reported 1994 income. Accordingly, there is a slight possibility that the amount was attributable to the two checks deposited at Chappell Hill Bank.

In October 1996, Bishop amended his 1994 return in an attempt to correct the problem, increasing his gross income from the practice of law by $400,000, resulting in a total of $1,076,262. He also adjusted his deductions, and paid appropriate additional taxes. Later, Bishop discovered that $196,006.74 of the $400,000 had in fact been included in the initial return and filed a second amended return in July 1998. Now Bishop's reported gross income from the practice of law was $890,255.[7]

In light of Campbell's findings, and Bishop's efforts to conceal his income and spending habits from IRS agents and his own accountants, a fraud investigation and criminal prosecution began. On 24 March 1999, a grand jury returned a three count indictment against Bishop. After a seventeen day trial, the jury convicted Bishop on all three counts. Subsequently, Bishop discovered that one of the jurors, Jodi Tharp, had been less than candid concerning her prior experiences with the law. Specifically, Tharp was charged with third degree felony embezzlement in 1997. Over the course of eight months, Tharp stole $42,250 from the bank where she worked. She pled guilty in Texas state court, and adjudication of the matter was deferred for ten years. At the time of Bishop's trial, she was paying a fine and restitution in installments, and was under community supervision, which is equivalent to probation.

On a juror questionnaire, Tharp responded "no" to the questions "Have you ever been convicted of a state or

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[7] Apparently no adjustment was made with regard to the omitted $10,000 check.

federal crime punishable by imprisonment for more than one year?" and "Have you ever been charged criminally other than with a traffic ticket?" During voir dire, she did not raise her hand in response to several questions as to whether she had ever been involved in a criminal matter, as an accused, witness, or victim. Nor did she respond when the judge gave the jurors an opportunity to raise their hands if they had anything to add regarding the previous questions.

After Tharp's criminal history was revealed, Bishop moved for a new trial. The district court held an evidentiary hearing and determined that Tharp was statutorily disqualified from serving on a jury, but denied Bishop's motion because he failed to demonstrate that Tharp was biased and that he suffered as a result of that bias. Bishop appeals this ruling and asserts that the district court made several other reversible errors before, during, and after the trial. We address each point raised, some in more detail than others.

II.

Bishop contends that counts one and three of the indictment are defective because they omit the tax deficiency and knowledge elements of tax evasion, and that count two contains no allegation he acted willfully in filing a false return. An indictment must allege each element of the charged offense, in order to insure that the grand jury finds probable cause that the defendant committed each element, to prevent double jeopardy, and to provide notice to the accused. *See United States v. Cabrera-*

Teran, 168 F.3d 141, 143 & n.5 (5th Cir. 1999). We consider the sufficiency of the indictment de novo. *See id.* at 143.

A.

The crime of tax evasion as defined in 26 U.S.C. § 7201 has three essential elements: (1) the existence of a tax deficiency; (2) willfulness; and (3) an affirmative act constituting evasion or attempted evasion of the tax. *See United States v. Townsend*, 31 F.3d 262, 266 (5th Cir. 1994) (citing *Sansone v. United States*, 380 U.S. 343, 351, 85 S. Ct. 1004, 1010, 13 L. Ed. 2d 882, 888 (1965)).

After describing the results of the audit in detail, count one of the indictment boldly alleges the following:

> [Bishop] did knowingly and willfully attempt to evade and defeat a substantial income tax due and owing by him . . . by: failing to timely file an income tax return on or about October 15, 1992, causing false and misleading books and records to be created, providing incomplete or misleading information to his tax preparer, concealing information likely to alert the IRS Revenue Agents to unreported income, and other affirmative acts of evasion.

Count three describes the misreporting of the fees deposited at the Chappell Hill Bank and states that Bishop "did willfully attempt to evade and defeat a substantial income tax due and owing by him . . . by preparing and causing to be prepared, and by signing and causing to be signed, a false and fraudulent United States Individual Income Tax Return-Form 1040."

Both count one and count three explicitly charge that a tax deficiency existed, that Bishop's acts were willful, and that he committed affirmative acts constituting evasion or attempted evasion. All elements were presented to the grand jury. Bishop argues that the indictment fails to acknowledge certain items that would offset any deficiency. This argument has no merit. The non-existence of credits, refunds, and other payments may affect the extent of any deficiency, but is not a specific element of tax evasion. There is no need to list each potentially offsetting item in the indictment. Counts one and three thoroughly describe the omission of large fees received in 1991 and 1994, respectively, the filing of the returns, and the related investigation. There is no question as to the nature of the charges. Counts one and three are legally sufficient.

B.

A person commits the felony of filing a false tax return in violation of 26 U.S.C. § 7206(1) when he "willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter." 26 U.S.C. § 7206(1). Count two of the indictment reads as follows:

> [Bishop] did willfully make and subscribe a United States Individual Income Tax Return-Form 1040, which was verified by a written declaration that it was made under the penalties of perjury and was filed with a Revenue Agent- . . . which 1991 income tax return [Bishop] did

> not believe to be true and correct as to every material matter in that the said federal income tax return reported Schedule C Gross Receipts of $988,599.00, whereas, [Bishop] then and there well knew and believed, that [Bishop's] 1991 Schedule C Gross Receipts were false, that is, that the Schedule C Gross Receipts were actually in excess of $1.5 million during 1991.

Bishop was charged with "willfully" filing a tax return that he "believed" to be "false." The indictment not only tracked the language of the statute, but also explicitly stated that Bishop knew the return was false but nonetheless chose to file it. Count two specifies that Bishop's Schedule C gross receipts for 1991 were understated, and additional discussion of the 1991 return appears in other portions of the indictment. No element of the crime was omitted. Count two of the indictment is also legally sufficient.

III.

Bishop challenges several of the district court's evidentiary rulings. We review these for abuse of discretion but affirm so long as any error is harmless. *See United States v. Taylor*, 210 F.3d 311, 314 (5th Cir. 2000); *United States v. Skipper*, 74 F.3d 608, 612 (5th Cir. 1996). In order to obtain a reversal, the complaining party must demonstrate that the district court's ruling caused him substantial prejudice. *See United States v. Izydore*, 167 F.3d 213, 218 (5th Cir. 1999).

A.

Both the government and the defendant introduced summary evidence. Bishop argues that Robert Simpson, an IRS agent who acted solely as the government's summary witness and not as an expert, testified to matters of which he had no personal knowledge, testified to the contents of letters that were hearsay, and gave his opinion on a variety of issues. Bishop also contends that the district court should not have admitted charts summarizing and clarifying the government witnesses' analysis, because the documents were misleading and confusing, and were not tempered by appropriate jury instructions.

The use of summary testimony and documents is governed by Rule 1006 of the Federal Rules of Evidence, which is broadly interpreted. *See Taylor*, 210 F.3d at 315; *United States v. Winn*, 948 F.2d 145, 158 (5th Cir. 1991). Rule 1006 allows admission of summaries when (1) the evidence previously admitted is voluminous, and (2) review by the jury would be inconvenient. *See Taylor*, 210 F.3d at 315; *United States v. Stephens*, 779 F.2d 232, 239 (5th Cir. 1985). A summary may include only evidence favoring one party, so long as the witness does not represent to the jury that he is summarizing all the evidence in the case. *See Flemister v. United States*, 260 F.2d 513, 517 (5th Cir. 1958).

Summary evidence must have an adequate foundation in evidence that is already admitted, and should be accompanied by a cautionary jury instruction. *See United States v. Means*, 695 F.2d 811, 817 (5th Cir. 1983). Full cross-examination and admonitions to the jury minimize the risk of prejudice. *See United States v. Castillo*, 77 F.3d

1480, 1500 (5th Cir. 1996); *United States v. Jennings*, 724 F.2d 436, 442 (5th Cir. 1984). We previously approved a cautionary instruction that "summaries do not, of themselves, constitute evidence in the case but only purport to summarize the documented and detailed evidence already submitted," and an instruction that a witness's summary "is not the evidence, the evidence is the documents themselves that he has been referring to." *United States v. Lavergne*, 805 F.2d 517, 521-22 (5th Cir. 1986) (quoting *United States v. Diez*, 515 F.2d 892, 905 (5th Cir. 1975)).

Summary charts in particular are admissible when (1) they are based on competent evidence already before the jury, (2) the primary evidence used to construct the charts is available to the other side for comparison so that the correctness of the summary may be tested, (3) the chart preparer is available for cross-examination, and (4) the jury is properly instructed concerning use of the charts. *See United States v. Goodwin*, 470 F.2d 893, 899 (5th Cir. 1972); *McDonnell v. United States*, 343 F.2d 785, 789 (5th Cir. 1965). Summaries may accompany the jury to the jury room. *See Winn*, 948 F.2d at 158-59.

We first note that it was appropriate to use summary evidence in this case. The trial consumed seventeen days of technical testimony and scores of exhibits were presented. Bishop argues that Simpson, a summary witness, testified to matters beyond the scope of a summary, but the government correctly explains that the bulk of Simpson's testimony was a recitation of facts already in the record. An exception is Simpson's expression of the opinion that several people harbored ill will toward Bishop, but this comment was a response to Bishop's lawyer's

question as to whether Simpson concurred in Locus' belief that the tip about the undisclosed Scharold fee came from Bishop's ex-wife. The only other opinion that Simpson expressed was that the government's case was correct, but this was acceptable because he summarized only the evidence favorable to the government. Simpson spoke only of evidence already in the record, and, on direct and cross examination, he fully expressed the limited basis of his testimony. We see no error in allowing Simpson to speak.

Campbell and Simpson based their summary charts on testimony and documentary evidence presented to the jury and available to the defense before trial. Both witnesses underwent extensive cross-examination.[8] Bishop argues that the charts should have been excluded because they did not include evidence elicited from government witnesses during cross-examination. This contention fails for the reason given above, that is, that a summary need not address all of the evidence. Bishop also protests that the charts were flawed because they did not list various items that arguably reduced his tax liability. Whether offsets were available was disputed at trial, and therefore, evidence regarding them was in the record and available to the jury, regardless of whether it appeared on the charts. Summaries admitted under Rule 1006 may go to the jury room. There was no abuse of discretion in admitting the summary testimony and exhibits.

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[8] Moreover, at trial, Bishop did not object to admission of many of Campbell's summaries, so review is limited to a determination as to whether a clear error occurred. *See United States v. Cantu*, 167 F.3d 198, 204 (5th Cir. 1999).

The jury instructions regarding the summary evidence were sufficient:

> Charts and summaries were shown to you in order to make the other evidence more meaningful and to aid you in considering the evidence. They are no better than the testimony and the documents upon which they are based, and are not themselves independent evidence. Therefore, you are to give no greater consideration of these schedules and summaries than you would give to the evidence upon which they are based.
>
> It is for you to determine the accuracy of the summary charts. You are entitled to consider the charts, schedules, and summaries if you find that they are of assistance to you in analyzing the evidence and understanding the evidence.

This instruction covered both the summary testimony and charts, and properly advises the jury that the information underlying the summaries, not the summaries themselves, is evidence, although the summaries may be a useful aid. The instruction was correct and submission to the jury was not an abuse of discretion.

B.

The district court should not have admitted IRS agents Campbell and Locus' notes regarding meetings they had with Bishop. Personal notes made by an investigator such as an IRS agent are not ordinarily admissible because they are hearsay. *See* Fed. R. Evid. 801(c), 803(8)(B). Rule 801(d)(1)(B) provides an exception when the notes are offered to "rebut an express or implied

charge against the declaring of recent fabrication or improper influence or motive." *United States v. Pena*, 949 F.2d 751, 757 (5th Cir. 1991) (quoting Fed.R.Evid. 801(d)(1)(B)).

Bishop's lawyers implied that Locus made mistakes or lied while testifying, but it does not appear that his supposed fabrications were recent or made with an improper motive. The cross examination of Campbell was an attempt to refresh her recollection rather than an effort to imply that her earlier testimony was false. Rule 801(d)(1)(B) cannot be construed to allow the admission of what would otherwise be hearsay every time a law enforcement officer's credibility or memory is challenged; otherwise, cross-examination would always transform hearsay notes into admissible evidence. The error, however, was harmless, as the content of the notes was thoroughly discussed on both direct and cross examination. Admitting the notes themselves added little to the weight of the evidence in the case.

C.

Bishop submits that the district court erred when it excluded testimony regarding statements made by the defendant's former bookkeeper, Pat Schulmeier, and by the defendant himself. Actually, the statements were hearsay and were not admissible. " 'Hearsay' is a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). Hearsay is not admissible unless an exception applies as provided by the Federal Rules of Evidence, other rules

adopted by the Supreme Court, or statute. *See* Fed. R. Evid. 802. Bishop argues that Schulmeier's statements, and his own, may be admitted as "statement[s] of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed." Fed. R. Evid. 803(3).

Schulmeier was Bishop's bookkeeper from 1991 to 1997. She died in February 1998. At trial, Bishop sought to introduce testimony that during 1996, Schulmeier met with Marc Grossberg, Bishop's tax lawyer, and Terri Raybourne, Bishop's legal assistant. The testimony proffered through Grossberg was that Schulmeier said she knew Bishop received a $400,000 fee in 1994, that it was her fault it was omitted from the books used to prepare his tax returns, and that she did not know why she failed to record the fee.

Bishop offered Schulmeier's statements in order to prove the truth of their content, that is, to show it was not his fault that all or a portion of the $400,000 fee was not reported to the IRS. Schulmeier's tendered statement was not an explanation of her current state of mind, but rather was a recitation of her memories of what she did and thought at an earlier date. The district court properly excluded the testimony regarding her statements.

Bishop asserts that his own statements to Grossberg are subject to the same exception to the hearsay exclusion. Grossberg testified that Bishop hired him in 1996 to assist with a 1996 civil audit, but was not allowed to say that Bishop said he did not expect the scope of the matter

to be any greater, that is, he did not expect he would face criminal charges. The district court properly excluded this testimony. Bishop's statements to Grossberg did not reflect his then current feelings or plans, but rather were self-serving assertions that he did not have the requisite intent for the crime now charged.

IV.

Bishop moved for a directed verdict at the close of the government's case in chief and again prior to submission of the matter to the jury. He also sought post conviction relief. As to counts one and three, he continues to assert there was not sufficient evidence that a tax deficiency existed, that he acted willfully, or that he committed an affirmative act of evasion. He also argues that there was not sufficient evidence of willfulness in support of count two.

We review the evidence in a light most favorable to the government and make all reasonable inferences and credibility choices in support of the jury's verdict. *See United States v. Moreno*, 185 F.3d 465, 471 (5th Cir. 1999); *United States v. Chesson*, 933 F.2d 298, 303 (5th Cir. 1991); *United States v. Kim*, 884 F.2d 189, 192 (5th Cir. 1989). If any rational trier of fact could have found proof of the essential elements of the crime beyond a reasonable doubt, the verdict will stand. *See Kim*, 884 F.2d at 192. "The evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, and the jury is free to choose among reasonable constructions of the evidence." *United States v. Bermea*, 30 F.3d 1539, 1551 (5th Cir. 1994).

A.

To support a conviction for attempted tax evasion, as alleged in counts one and three, the government must prove beyond a reasonable doubt that there was a tax deficiency, an affirmative act constituting an attempt to evade or defeat the tax, and willfulness. *See Sansone*, 380 U.S. at 351, 85 S. Ct. at 1010, 13 L. Ed. 2d at 888. A deficiency is the amount by which the tax imposed by statute exceeds the sum of (1) the amount of tax shown on the return, (2) plus the amount of any previously assessed deficiency, (3) minus any rebate previously received. *See* 26 U.S.C. § 6211; *United States v. Wright*, 211 F.3d 233, 236 (5th Cir. 2000); *Chesson*, 933 F.2d at 303-04.[9] The government must demonstrate the existence of a deficiency beyond a reasonable doubt, but need not prove

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[9] Contrary to Bishop's suggestion, the five items he identifies were not "rebates" reducing the extent of any deficiency which would otherwise exist. Rebates are not credits, refunds, or other payment made by the taxpayer, but rather are payments the IRS makes to a taxpayer "on the ground that the income tax imposed . . . is less than the excess of (1) the amount shown as the tax by the taxpayer upon the return increased by the amount previously assessed (or collected without assessment) as a deficiency over (2) the amount of rebates previously made." Treas. Reg. § 301.6211-1(f). For example, a refund made because too much tax was withheld at the source is not a rebate, but a refund made because the IRS determined taxpayer's return overstated the tax due is a rebate. *See id.* Moreover, the existence of a rebate will actually increase the extent of deficiency, not decrease it according to the formula above, as the taxpayer returns the credit now known to be unwarranted. *See Miles Prod. Co. v. CIR*, 987 F.2d 273, 276-77 & n.3 (5th Cir. 1993); *United States v. Wilkes*, 946 F.2d 1143, 1149 (5th Cir. 1991).

the extent of the deficiency with mathematical certainty. *See Chesson*, 933 F.2d at 304. There is no deficiency in the absence of a showing that the government is actually due a tax in excess of that reported. *See Willingham v. United States*, 289 F.2d 283, 285 (5th Cir. 1961). Therefore, undeclared deductions, credits, losses carried over from prior years, and so on, should be considered when calculating the deficiency. *See Sansone*, 380 U.S. at 353, 85 S. Ct. at 1011, 13 L. Ed. 2d at 888; *Wright*, 211 F.3d at 236-37; *United States v. Fogg*, 652 F.2d 551, 555 (5th Cir. 1981); *Willingham*, 289 F.2d at 285.

Under 26 U.S.C. § 7201, willfulness is "a voluntary, intentional violation of a known legal duty." *Kim*, 884 F.2d at 192. Evidence is usually circumstantial as direct proof is rarely available. *See id.* A wide range of conduct can support a finding of willful attempt to evade taxation, for instance: keeping a double set of books, making false entries or alterations, creating false invoices or documents, destroying books or records, concealing assets or covering up sources of income, handling one's affairs to avoid making the records normally accompanying transactions of a particular kind, any conduct likely to mislead or conceal, holding assets in others' names, providing false explanations, giving inconsistent statements to government agents, failing to report a substantial amount of income, a consistent pattern of underreporting large amounts of income, or spending large amounts of cash that cannot be reconciled with the amount of reported income. *See Chesson*, 933 F.2d at 304; *Kim*, 884 F.2d at 192; *United States v. Calles*, 482 F.2d 1155, 1159-60 (5th Cir. 1973).

1.

At trial it was established that Bishop owed a tax for 1991, even giving due regard for all appropriate credits. Bishop identifies five items he asserts offset any underpayment attributable to his failure to report the fees he received in 1991. He first explains he made a "payment of $75,000 to the IRS in 1988 when he had a net loss that has not been shown as a credit elsewhere." This was a payment of employment taxes, he received an appropriate deduction, and the payment has no further role in his income tax liability.[10] Second, Bishop asserts he made a $38,360 overpayment in 1989, and that this payment was not applied to his 1990 estimated tax, as he requested. Third, Bishop says his 1989 income was overstated because his return was prepared using the status "married filing joint return." Bishop later changed his status to "married filing separate return" but made no other adjustments. At trial, he presented testimony that under

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[10] Locus testified that he was suspicious of a net operating loss of approximately $85,000 reported on Bishop's 1988 return, and was particularly interested in a $75,000 expense attributed to payroll taxes and related interest expenses. Locus determined that a check for $75,000, payable to the IRS, was drawn on Bishop's account at Bear Stearns. His information returns master file transcript, a record of all payments made to the IRS, shows a $74,896 payment drawn from the Bear Stearns account to pay employee benefits taxes.

Bishop's 1988 tax return is not in evidence, but a draft of a portion of the return shows a net operating loss of $86,327. Bishop's 1989 return includes a net operating loss of $85,226, with no further explanation. The government suggest [sic] the loss from the prior year was carried over, and there is no evidence to the contrary.

Texas community property law, his wife should have reported half the income. The net effect of this error, however, was not specified at trial and remains doubtful because other errors in the return may have displaced any positive effect of the error in filing status.[11] Next, half of a $50,000 payment Bishop made to the IRS in April 1991 should have been applied to 1990. The IRS treated the entire amount as an estimated tax payment for 1991 instead, ignoring the instructions accompanying the check. Finally, Bishop indicates the IRS never refunded $43,171 attributable to excessive estimated tax payments made during 1991. Bishop clearly underreported his income that year and there is no reason to believe he should receive this refund.

Accordingly, Bishop was not entitled to credit for the first and fifth items, and the amount of the third is an indeterminate amount. The four items of known quantity total $181,531. A substantial deficiency therefore remained if one accepts Campbell's virtually uncontested testimony that Bishop underpaid by at least $250,000.00.[12]

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[11] The effect of Bishop's filing status was also discussed in his presentence filings. According to Charles O. Matthys, Bishop's expert witness, Bishop failed to report all of his 1989 income, and this displaced the positive effect of the error in filing status.

[12] This figure includes $10,247.00 in self employment tax. Matthys largely agreed with Campbell's analysis, particularly regarding the Scharold and Cash fees, although Matthys believed Bishop's unreported income from the last quarter of 1991 was $110,085.72, not $150,344.77 as Campbell stated. Matthys did not provide an estimate as to the amount of tax Bishop owed, but obviously there would be a significant underpayment.

Of course, the exact amount of the deficiency cannot be determined. The point is first, that the evidence does not show that Bishop was entitled to credit for all five items he identifies, and second, that a substantial discrepancy still exists when credit is given. Accordingly, Bishop's argument that there was not sufficient evidence of deficiency is without merit.

There also was ample evidence that Bishop willfully engaged in attempts to evade income tax due for 1991. The evidence established that Bishop, as proprietor of GMBA, kept track of the firm's finances. He obviously knew when substantial fees were received. He directly caused the reversal of the initial GMBA ledger entry regarding the $933,333.33 Scharold fee. He deposited that fee and a substantial portion of the $183,666.67 Cash fee in his personal accounts, circumventing his firm's normal record keeping process. Responsibility for accounting for the fees shifted to Bishop himself, but he did not fulfill his responsibility.

Instead, he provided incomplete and inaccurate information to his return preparer, Elwyn Shaw, and to Joel Reed, who replaced Shaw and completed the 1991 return. When Shaw asked about the two entries regarding the Scharold fee, Bishop declined to explain them. Bishop did not let Reed see the ledger at all, and told him that income received during the last quarter of 1991 and recorded in GMBA's general ledger would appear on a corporate return, which was not true. Although Locus and Campbell generally found Bishop to be cooperative, he concealed or declined to provide information regarding receipt of non-reported income, depositing business checks in personal accounts, and purchases of expensive

assets including real estate and jewelry for his then-fianceé. Bishop acknowledged reviewing the 1991 return. He advised Reed to add $140,000 to his income because he paid that sum to his ex-wife, but ignored the fact that his final reported gross income from the practice of law, $988,599.25, could not possibly include the total of the Scharold and Cash fees, let alone his other business income. The evidence of Bishop's actions more than adequately supports the jury's verdict as to 1991.

2.

Bishop's claim that there is no evidence of an affirmative act of evasion with respect to the 1994 tax year is incorrect. As stated above, Bishop knew when large fees were received at the firm. The payments deposited at Chappell Hill Bank were substantial. Bishop specifically requested that the $400,000 check be deposited in his personal account, knowing that such a transaction would prevent the fee from being recorded in his firm's books. He then gave inaccurate and misleading information to his return preparers, telling them that there was no income other than that listed on the firm's books. He reviewed the return before signing it. His confusion with regard to the partial reporting of the $400,000 does not excuse his other actions, particularly when they are viewed in combination with Bishop's experience as a lawyer, his failure to file timely returns, and the large sums of money involved.

B.

To prove the willful filing of a false return in violation of 26 U.S.C. § 7206, the government must show (1) that a false return was made and signed, (2) that the false entry was material, (3) that the return contained a written declaration that it was made under the penalties of perjury, (4) that the defendant did not believe that the return was true and correct when signed, and (5) that the defendant signed willfully and with specific intent to violate the law. *See United States v. Bishop*, 412 U.S. 346, 350, 93 S.Ct. 2008, 2012, 36 L. Ed. 2d 941, 945 (1973); *United States v. Wisenbaker*, 14 F.3d 1022, 1024 (5th Cir. 1994); *United States v. Robinson*, 974 F.2d 575, 579 (5th Cir. 1992).

Bishop admitted that he signed the 1991 return, the falsity of which was virtually undisputed. The amount of the underreported income is such that the error was material. The reversal of the initial Scharold fee entry, along with the bypassing of the operating account with the Cash fee, supported a finding of knowledge and willfulness. The evidence produced at trial is sufficient to sustain the conviction.

V.

Bishop asserts that the district court's jury instructions as to the deficiency element of tax evasion were inadequate. Jury instructions must, as a whole, correctly state the law and clearly inform jurors of the principles of law applicable to the factual issues. *See United States v. Martinez*, 190 F.3d 673, 678 (5th Cir. 1999); *United States v. Cartwright*, 6 F.3d 294, 300 (5th Cir. 1993). The elements of the crime that the government needs to prove beyond a

reasonable doubt must be explained to the jury through the court's instructions. *See Sandstrom v. Montana*, 442 U.S. 510, 520, 99 S.Ct. 2450, 2457, 61 L. Ed. 2d 39, 48 (1979); *United States v. Moser*, 123 F.3d 813, 826 (5th Cir. 1997). The trial judge is not obligated to give a requested instruction if its content is adequately covered by the other charges. *See United States v. Asibor*, 109 F.3d 1023, 1035 (5th Cir. 1997).[13]

As we have already stated, the elements of tax evasion are: (1) a tax deficiency, (2) an affirmative act constituting an evasion or attempted evasion of the tax, and (3) willfulness. *See Sansone v. United States*, 380 U.S. at 351, 85 S.Ct. at 1010, 13 L. Ed. 2d at 888. The district court advised the jury that a deficiency was present if "the defendant owed substantially more federal income tax for the calendar years 1991 (Count One) and 1994 (Count Three) than was declared due on his income tax returns." There were no additional instructions as to how to calculate the deficiency. According to Bishop, the instruction limited the jury's inquiry to the content of the returns he filed, and prevented consideration of five credits, refunds, or payments he made or qualified for but did not report on his returns. Therefore, he asserts he paid more

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[13] "No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the objection." Fed. R. Crim. P. 30. At trial, Bishop did not challenge the instruction on deficiency, although he objected to the instruction on willfulness, and, prior to trial, proposed a somewhat more detailed instruction on deficiency.

than he actually owed and did not commit tax evasion, as no deficiency was present.

The district court did not specify that the jury should consider unreported payments Bishop may have made in previous years. The jury could, however, still take such items into account when determining the amount of tax Bishop actually owed, regardless of whether each item appeared on his returns. In closing arguments, Bishop's lawyers stressed that he made substantial payments to the IRS on several occasions. The jury had the opportunity to consider these past payments when determining whether a deficiency was present. The jury may not, however, have found the evidence to be convincing. As we explain above, Bishop was not entitled to credit for all five items, and even if he was, a substantial deficiency would remain. Therefore, the outcome of the trial was consistent with the jury's consideration of the potential credits identified by Bishop.

Bishop also complains that the trial court did not require the jury to find that he knew of any tax deficiency. Knowledge is an essential element of tax evasion and of signing a false tax return. Bishop's assertion, however, is without merit. The court repeatedly and thoroughly informed the jury that proof of knowledge on the part of the defendant was required. Instructions included definitions of the terms "knowingly" and "willfully." The court explained that the charged crimes were specific intent crimes, and that therefore the government must prove the defendant not only had the intent to perform a particular act, but also knew that act was illegal. Methods of demonstrating intent were described. Willfulness was discussed as an element of each of the charged crimes. As

we state above, there was ample evidence of intent on Bishop's part. The jury properly, and in accordance with the court's instructions, found that Bishop had knowledge of the deficiency.

VI.

Bishop appeals the district court's ruling denying his motion for a new trial in light of juror Tharp's criminal history. A district court's decision denying of a motion for a new trial on the basis of juror bias is reviewed for abuse of discretion. *See United States v. Doke*, 171 F.3d 240, 246 (5th Cir. 1999); *United States v. Soto-Silva*, 129 F.3d 340, 343 (5th Cir. 1997). In order to obtain a new trial, the moving party must demonstrate that a juror failed to answer a material voir dire question honestly, and that a correct response would have been a valid basis for a challenge for cause. *See McDonough Power Equip., Corp. v. Greenwood*, 464 U.S. 548, 556, 104 S.Ct. 845, 850, 78 L. Ed. 2d 663, 671 (1984); *Doke*, 171 F.3d at 246-47. Motivations for concealing information may vary, but only those affecting a juror's impartiality can truly be said to affect the fairness of a trial. *See McDonough*, 464 U.S. at 556, 104 S.Ct. at 850, 28 L. Ed. 2d at 671. Therefore, once the trial is complete, a felon's serving as a juror is not an automatic basis for a new trial. The defendant must demonstrate that the juror was actually biased or fundamentally incompetent. *See Soto-Silva*, 129 F.3d at 343; *United States v. Scott*, 854 F.2d 697, 698-99 (5th Cir. 1988); *United States v. Gates*, 557 F.2d 1086, 1088 (5th Cir. 1977) (quoting *Ford v. United States*, 201 F.2d 300, 301 (5th Cir. 1953)). *See also Coughlin v. Tailhook Ass'n*, 112 F.3d 1052, 1058-59 (9th Cir. 1997); *United States v. Langford*, 990 F.2d 65, 68-70 (2d Cir.

1993); *United States v. Humphreys*, 982 F.2d 254, 261 (8th Cir. 1992); *United States v. Boney*, 977 F.2d 624, 633-35 (D.C. Cir. 1992).

Actual bias exists when a juror fails to answer a material question accurately because he is biased. *See McDonough*, 464 U.S. at 556, 104 S.Ct. at 850, 78 L. Ed. 2d at 671. In the majority of situations, the party seeking a new trial must demonstrate bias through admission or factual proof. *See Scott*, 854 F.2d at 699 (quoting *United States v. Nell*, 526 F.2d 1223, 1229 (5th Cir. 1976)). Bias may, however, be implied or presumed in extreme circumstances, including when the juror is employed by the prosecuting agency, is a close relative of a participant in the trial, or is somehow involved in the transaction that is the subject of the trial. *See id.* (quoting *Smith v. Phillips*, 455 U.S. 209, 222, 102 S.Ct. 940, 948, 71 L. Ed. 2d 78, 89 (1982) (O'Connor, J., concurring)). Indicia of partiality are particularly problematic when coupled with the juror's lies or other efforts to hide a potential disqualification. *See id.* at 699-700.

The Ninth Circuit presumed bias was present in two recent cases in which jurors engaged in a pattern of lying and other conduct intended to cover up their disqualifications. In *Dyer v. Calderon*, 151 F.3d 970 (9th Cir. 1998), a juror in a homicide case did not respond to voir dire questions as to whether she or any close family members had a criminal history or were crime victims. Later, it was discovered that the juror's brother was shot and killed six years earlier. The juror explained that she did not think she had to say anything because she believed her brother's death was an accident. The court presumed she was biased because her explanation was not plausible.

She was close with her brother, was the plaintiff in a civil suit regarding his death, knew he was shot several times in the back and head, and knew the shooter was charged with murder. Moreover, she failed to mention that her husband was charged with rape a month before the trial, that she was the victim of a number of burglaries and other crimes, and that a number of her close relatives committed serious crimes. Her pattern of conduct showed that she sought to serve on the jury despite circumstances that she knew could disqualify her and which may well have affected her ability to be impartial.

In *Green v. White*, 232 F.3d 671 (9th Cir. 2000), a juror failed to reveal his assault conviction in a juror questionnaire and in voir dire. He explained that the questions were confusing and said he forgot about his conviction, but it was impossible that he forgot the six months he spent in jail. He also commented during the trial that he always knew the defendant was guilty. Again, the pattern of lies suggested a desire to serve on the jury and determine the outcome of the case.

On the other hand, inaccurate responses to voir dire questions are excused when caused by inattention or when a query does not elicit the specific information relevant to the juror's disqualification. See cases cited in *Scott*, 854 F.2d at 700 & n. 12. Failure to disclose a conviction due to a mistaken, but honest belief the record was expunged, or due to embarrassment, also does not suggest bias. *See United States v. Langford*, 990 F.2d at 66-67, 69-70; *United States v. Humphreys*, 982 F.2d at 260-61. Even when a juror's non-disclosure is dishonest as opposed to mistaken, his behavior is not a basis for reversal unless

the dishonesty appears to be rooted in bias or prejudice. *See Coughlin*, 112 F.3d at 1061.

The deferred adjudication statutorily disqualified Tharp from serving on a jury. 28 U.S.C. § 1865(a) directs each federal judicial district to set up a system to determine whether each person called for jury duty is qualified to serve. 28 U.S.C. § 1865(b) lists situations in which an individual is statutorily disqualified from serving as a juror, including when he "has a charge pending against him for the commission of, or has been convicted in a State or Federal court or record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored." 28 U.S.C. § 1865(b)(5).

Article 42.12, section 5(a) of the Texas Code of Criminal Procedure allows deferred adjudication:

> [W]hen in the judge's opinion the best interest of society and the defendant will be served, the judge may, after receiving a plea of guilty or plea of nolo contendere, hearing the evidence and finding that it substantiates the defendant's guilt, defer further proceedings without entering an adjudication of guilt, and place the defendant on community supervision.

Once the defendant successfully completes community supervision, the proceedings are dismissed. *See* Tex. Code Crim Proc. art. 4212, § 5(c). If the defendant violates the conditions of supervision, the court may enter an adjudication of guilt on the original charges and impose a punishment. *See id.* § 5(b). A dismissal and discharge upon completion of supervision is not a "conviction" triggering disqualifications or disabilities usually visited upon convicted felons. *See id.* § 5(c). Until supervision is

complete, however, the deferred adjudication is treated as a pending charge. *See Thomas v. State*, 796 S.W.2d 196, 197-98 & n. 1 (Tex.Crim.App.1990).

Accordingly, Tharp's deferred adjudication was equivalent to a pending charge. A third degree Texas felony is punishable by imprisonment for two to ten years. *See* Tex. Penal Code § 12.34. Therefore, under 28 U.S.C. § 1865(b)(5), Tharp could not serve on Bishop's jury. Her status was an appropriate basis for a challenge for cause. The inquiries on the questionnaire and during voir dire sought to elicit information about her status, and were directly on point. Therefore her failure to respond was material. A new trial, however, is not warranted because Bishop did not demonstrate that Tharp was biased.

Tharp could not be presumed to be biased. Unlike the jurors in *Dyer* and *White*, she offered a plausible explanation for her failure to answer the juror questionnaire and voir dire inquiries regarding her criminal history accurately. She explained to the trial judge that the lawyer who represented her in the embezzlement matter told her that because adjudication of the charge was deferred, she need not tell anyone about it, for instance when applying for a job. Accordingly, she answered "no" on the questionnaire and did not raise her hand during voir dire because she believed the questions did not apply to her situation. Tharp was wrong, but it is quite possible she misunderstood the nature of the deferred adjudication. As demonstrated by the discussion above, the analysis required to arrive at the conclusion that Tharp could not serve is rather involved, especially when considered in conjunction with Tharp's lawyer's instructions to her.

Tharp's probation officer, Josette Robinson, suggested that Tharp did not respond to the questions truthfully because she was in denial about her criminal history. Robinson believed Tharp knew she could not serve on a jury, or at least knew she should have asked Robinson what to do. This possibility alone is not determinative. Regardless of whether Tharp made a simple mistake or actually lied in order to escape her past, there is no suggestion that she especially desired to serve on the jury. Her motivations appear to have been purely personal and do not indicate she was prejudiced. Nor are there any other troubling circumstances such as a relationship with one of the participants. Accordingly, bias cannot be implied or presumed.

Nor did Bishop present factual proof that Tharp was partial to one side or the other. Tharp herself denied she had any improper motive, and there is no contradictory evidence. She said she did not especially want to serve on the jury. Her crime was somewhat similar to Bishop's, and she knew what it felt like to be in his position, but did not feel sympathy for him. Nor did she favor the government. She did not reveal her experiences to the other jurors. She is not known to have expressed any strong opinions at the time the trial took place, or later. As the trial court noted, she probably was not particularly influential in deliberations, as the other jurors were older and more highly educated, and the deliberations lasted only a day despite the length of the trial. Bishop's lawyer questioned Tharp about her bankruptcy discharge, which occurred about a year after the embezzlement matter was considered, and suggested she owed taxes on the stolen money. Apparently the possibility had

not previously occurred to Tharp, and therefore could not influence her. The district court did not abuse its discretion by denying Bishop's motion for a new trial.

VII.

Although Tharp was statutorily disqualified from serving on Bishop's jury, there is no evidence she was biased against him. The district court should not have admitted the IRS agents' notes, which were hearsay, but the error was harmless. Bishop's remaining arguments are without merit. We confirm Bishop's convictions on all three counts.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§ §	CR. NO. H-99-153
v.	§ §	(Filed May 25, 2000)
GEORGE MEREDITH BISHOP, III	§ §	

ORDER DENYING DEFENDANT'S [SECOND] MOTION FOR NEW TRIAL

Pending are Defendant George Bishop's [Second] Motion for New Trial and Request for Evidentiary Hearing (Document No. 174), and Supplement to Defendant's Motion for New Trial (Document No. 185), to which the United States has filed its responses in opposition.

The Judgment in this criminal case was entered March 16, 2000, and on March 20, 2000, Defendant Bishop filed his Notice of Appeal. The instant motion for new trial was filed March 27, 2000, five days after Defendant Bishop states that he learned for the first time that a member of the jury, Jodi Tharp, "had been convicted of a felony, particularly third degree felony theft," in the 232nd Judicial District Court of Harris County, Texas. Defendant's Motion, Ex. A: Affidavit of George M. Bishop, 1. Defendant contends that Jodi Tharp's "felony conviction," *id.*, is newly discovered evidence that Ms. Tharp failed to disclose upon *voir dire* of the jury panel, which thereby permits the filing of a motion for new trial more than seven days after the verdict. FED. R. CRIM. P.

33.[1] Defendant requested the Court to conduct an evidentiary hearing to determine whether Ms. Tharp did indeed have the criminal history record that Defendant asserted and, if so, what explanation she had for her conduct in this case. *See United States v. Boney*, 977 F.2d 624 (D.C. Cir. 1992) (Boney I); *United States v. Boney*, 68 F.3d 497 (D.C. Cir. 1995) (Boney II).

Because of the serious question raised by Defendant's motion and the possibility that Ms. Tharp was a biased juror, over the Government's objection the Court GRANTED Defendant's Request for an Evidentiary Hearing (Document No. 174-2), issued a subpoena for the appearance of Ms. Tharp, and upon a showing that she was financially unable to employ counsel, appointed the Federal Public Defender to represent Ms. Tharp. The hearing began on May 16, 2000, and concluded on May 17, 2000.

Jurisdiction

This Court does not have jurisdiction to grant a new trial to Defendant because the case is now on appeal and has not been remanded to this Court. *See* FED. R. CRIM. P. 33. The trial court during the pendency of an appeal, however, does have jurisdiction to entertain the motion for new trial and either deny the motion on its merits or certify to the Court of Appeals the trial court's intention

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[1] Defendant's original Motion for New Trial (Document No. 148), which was timely filed within the enlarged period of time granted by the Court, was denied by Order entered January 19, 2000. (Document No. 150).

to grant the motion if the Court of Appeals remands the case to the trial court. *See United States v. Cronic*, 466 U.S. 648, 667 n. 42 (1984); *see also United States v. Fuentes-Lozano*, 580 F.2d 724, 725-26 (5th Cir. 1978). It is in the context of this limited jurisdiction that the evidentiary hearing was conducted.

Ms. Tharp's Statutory Disqualification

Ms. Tharp was charged in state court with third degree felony theft and, in October, 1997, pled guilty to that offense in connection with a plea agreement that permitted her to receive a community supervision order and deferment of adjudication of guilt. The state court approved the plea agreement, ordered 10 years deferred adjudication, a $500 fine, and a restitution payment of $42,250. Ms. Tharp just after her sentencing paid $20,000 of the restitution as agreed, and she was required to pay the balance in monthly installments. Although she has missed and made up payments on occasion, she was current on her restitution payments when this matter was heard on May 16-17, 2000.

The procedure known under Texas law as deferred adjudication is authorized by TEX. CODE CRIM. P. ANN. art. 42.12, § 5(a) (West 1979 & Supp. 2000), which reads in part:

> [W]hen in the judge's opinion the best interest of society and the defendant will be served, the judge may, after receiving a plea of guilty or plea of *nolo contendere*, hearing the evidence and finding that it substantiates the defendant's

> guilt, defer further proceedings without entering an adjudication of guilt, and place the defendant on community supervision.

If one who receives deferred adjudication violates a condition of community supervision, then the court upon hearing may proceed with an adjudication of guilt on the original charges and *assess* punishment. *See id.* § 5(b). On the other hand, if the defendant successfully serves her term of community supervision and if the judge has not proceeded to an adjudication of guilt, then "the judge shall dismiss the proceedings against the defendant and discharge [her]." *Id.* § 5(c). With an exception which is not applicable to this summary, "a dismissal and discharge under this section may not be deemed a conviction for the purposes of disqualifications or disabilities imposed by law for conviction of an offense." *Id.*

Ms. Tharp's deferred adjudication in 1997, therefore, was not – as erroneously stated by Defendant Bishop in his affidavit – a "felony conviction," although the *possibility* of such a conviction remains for the duration of Ms. Tharp's community supervision. If Ms. Tharp successfully completes her community supervision, then the charges against her will be dismissed and, in effect, the slate will be wiped clean and she will not have a criminal conviction upon her record from this occurrence. In the meanwhile, during the term of her community supervision, deferred adjudication under Texas law is treated as if there is still a pending case against her. *See Thomas v. States*, 796 S.W.2d 196, 198 n.1 (Tex. Crim. App. 1990).

Under federal law, a person is not qualified to serve on a petit jury if she

> has a charge pending against [her] for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and [her] civil rights have not been restored.

28 U.S.C. § 1865(b)(5). A felony of the third degree under Texas law is punishable by imprisonment for a term from 2 to 10 years. *See* TEX. PENAL CODE ANN. § 12.34 (West 1994 & Supp. 2000). Ms. Tharp therefore was statutorily disqualified from serving on the Bishop jury not because of a felony conviction but because of the third degree felony theft charge still deemed pending against her while she serves her deferred adjudication term of community supervision.

Timeliness of Defendant's Motion

The Government has challenged Defendant Bishop's credibility and argues that his affidavit and his testimony that he first learned about Ms. Tharp's criminal history as recently as March 22, 2000, should not be believed. At the evidentiary hearing one of Defendant's trial counsel, George McCall Secrest, testified, and affidavits were received from his other trial counsel, David L. Botsford, and his trial consultant/expert, Charles O. Matthys. The Government at the conclusion of the hearing conceded that Messrs. Secrest, Botsford, and Matthys did not know about Ms. Tharp's criminal history at the time of jury selection and trial. The Government contends, however, that Defendant Bishop is not a credible witness and should not be believed when he claims that he did not know about Ms. Tharp's statutory disqualification until March 22, 2000. The government has pointed to a number

of statements that Defendant Bishop made under oath in a sentencing hearing affidavit which the Government states are demonstrably false. Defendant Bishop in the May 16-17 hearing also failed to call as witnesses either his client or his investigator, both of whom he claims were instrumental in causing him only recently to authorize and procure the criminal history investigation from which he discovered Ms. Tharp's statutory disqualification. For those reasons, combined with Bishop's felony conviction, the Government argues that Bishop's uncorroborated statement of his not having learned of the criminal history of Ms. Tharp until March 22, 2000, is not worthy of belief and that the Court cannot find from a preponderance of the credible evidence that his motion was timely filed.

The Court observes that a witness who by reason of his prior conduct may be shown not to be entirely credible may on a given issue speak the truth and on that matter may be found to be credible. This is equally true for Mr. Bishop as for Ms. Tharp. Moreover, it seems highly improbable that a defendant on trial on felony charges, upon discovering a juror's statutory disqualification before, during, or even after trial within the time permitted for the filing of a motion for new trial as a matter of right, would not have disclosed that information to the attorneys who were entrusted to defend his case. The Court finds from a preponderance of the evidence that Defendant Bishop timely filed the instant motion for new trial after he first learned of Ms. Tharp's statutory disqualification.

The Law Applicable to an Undisclosed Statutory Disqualification

Ms. Tharp did not disclose her statutory disqualification from jury service on her juror questionnaire form or during *voir dire* of the jury panel, as will be detailed below. The undisclosed statutory disqualification, however, in and of itself does not entitle Defendant to a new trial. To the contrary, Defendant must prove not only the statutory disqualification, which is uncontroverted in this case, but also that the disqualified juror was actually biased or prejudiced against Defendant.

"A motion for new trial based on a juror's lack of statutory qualification (not raised before trial) should be granted only upon a showing of actual bias or prejudice." *United States v. Soto-Silva*, 129 F.3d 340, 343 (5th Cir. 1997); *see also Ford v. United States*, 201 F.2d 300, 301 (5th Cir. 1953) ("Where the objection to a juror relates, not to actual prejudice or other fundamental competence, but to a statutory disqualification only, such disqualification is ordinarily waived by failure to assert it until after verdict, even though the facts which constitute the disqualification were not previously known to the defendants."). A motion for new trial based on a juror's failure to disclose a prior felony conviction or pending criminal charge falls squarely within this rule. *See Ford*, 201 F.2d at 301; *Atlas Roofing Mfg. Co. v. Parnell*, 409 F.2d 1191, 1193 (5th Cir. 1969). "[T]he Sixth Amendment guarantee of an impartial trial does not mandate a *per se* invalidation of every conviction reached by a jury that included a felon." *United States v. Boney*, 977 F.2d 624, 633 (D.C. Cir. 1992). The same rule applies to one on deferred adjudication

who has not been adjudged a felon but who has pled guilty to a felony charge that remains pending.

A court must presume that a juror was impartial, and the movant has the burden of proving otherwise by a preponderance of the evidence. *See United States v. Wilson*, 116 F.3d 1066, 1087 (5th Cir. 1997), *rev'd as to another defendant on other grounds, United States v. Brown*, 161 F.3d 256 (5th Cir. 1998) (en banc). "To obtain a new trial for juror bias, [the Fifth] [C]ircuit requires a party to meet the test of the plurality opinion in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S 548, 556, 104 S. Ct. 845, 850, 78 L.Ed.2d 663 (1984); 'a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause.' " *United States v. Doke*, 171 F.3d 240, 246 (5th Cir. 1999). In addition, the Supreme Court and the Fifth Circuit require that the movant demonstrate that the juror failed to answer the question correctly *because* the juror was biased. *See McDonough*, 104 S. Ct. at 850 ("The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial."); *id.* ("[R]egardless of whether a juror's answer is honest or dishonest, it remains within a trial court's option, in determining whether a jury was biased, to order a post-trial hearing at which the movant has the opportunity to demonstrate actual bias or, in exceptional circumstances, that the facts are such that bias is to be inferred.") (Blackmun J., with whom Stevens, J. and O'Connor, J. joined, concurring); *id.* at 851 ("[T]o be awarded a new trial, a litigant should be required to demonstrate that the juror incorrectly

responded to a material question on *voir dire*, and that, under the facts and circumstances surrounding the particular case, the juror was biased against the moving litigant. . . . Whether the juror answered a particular question on *voir dire* honestly or dishonestly, or whether an inaccurate answer was inadvertent or intentional, are simply factors to be considered in this latter determination of actual bias.") (Brennan J., with whom Marhsall, J. joined, concurring in the judgment); *United States v. Scott*, 854 F.2d 697, 698-99 (5th Cir. 1988) (noting that though "[t]he dispute here, as the trial judge and the United States couched it, is whether [the juror] 'failed to answer honestly'[,] [a]t bottom, however, the issue is whether [the juror] was biased because of his relationship with his brother").

"[J]uror bias can come to light in two ways: 'by express admission or by proof of specific facts showing such a close connection to the circumstances at hand that bias must be presumed.' " *United States v. Scott*, 854 F.2d 697, 699 (5th Cir. 1988) (*quoting United States v. Nell*, 526 F.2d 1223, 1229 (5th Cir. 1976)). Situations in which bias must be presumed or implied are "exceptional." *McDonough Power Equipment, Inc. v. Greenwood*, 104 S. Ct. 845, 850 (1984) (Blackmun, J. concurring), and "extreme." *Smith v. Phillips*, 102 S. Ct. 940, 948 (1982) (O'Connor, J. concurring). "Some examples [of implied bias] might include a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction." *Smith*, 102 S. Ct. at 948 (O'Connor, J. concurring). "The implied bias doctrine

should not be invoked lightly." *Gonzales v. Thomas*, 99 F.3d 978, 987 (10th Cir. 1996). "These extreme cases occur when a juror has a relationship in which the potential for substantial emotional involvement, adversely affecting impartiality, is inherent." *United States v. Frost*, 125 F.3d 346, 379-80 (6th Cir. 1997) (internal quotations omitted). A juror's dishonesty during *voir dire* is one factor to be considered when determining whether the juror was impliedly biased. *See Skaggs v. Otis Elevator Co.*, 164 F.3d 511, 517 (10th Cir. 1998). The defendant must "raise a contention of bias from the realm of speculation to the realm of fact." *United States v. Brown*, 644 F.2d 101, 105 (2d Cir. 1981).

Findings from the Evidentiary Hearing Regarding Ms. Tharp

At the evidentiary hearing conducted on May 16-17, 2000, the Court examined Ms. Tharp at length, and then gave the attorneys for both sides the same opportunity.[2] Defendant Bishop's counsel conducted a full, lengthy, and detailed cross-examination of Ms. Tharp and, as well, presented testimony from her Harris County Community Supervision Officer and the assistant district attorney who investigated and prosecuted her state court case and made the plea agreement with her in October, 1997. The Court also received in evidence a number of exhibits.

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[2] Upon motion of the United States pursuant to 18 U.S.C. §§ 6002, 6003, Ms. Tharp was ordered to provide testimony or other information under a grant of immunity for her testimony and information, except for perjury, giving a false statement, or failing to comply with the Court's Order.

After having heard and considered all of the evidence and the arguments of counsel, and having evaluated most carefully the testimony and demeanor of Ms. Tharp, the Court finds the following from a preponderance of the evidence:

Ms. Tharp was seated as a juror in the trial of Defendant Bishop in October, 1999. Before being assigned to the panel and sent to the courtroom for jury selection in the Bishop trial, Ms. Tharp filled in a juror information form that is given to all jurors. On the face of the juror questionnaire form, which is *not* copied or given to the attorneys in a case, appears the name of the juror, her address, and her home and work telephone numbers. Also on the face of this juror questionnaire form are answers to several questions which may be examined only by the Court, one of which reads: "Have you ever been convicted of a state or federal crime punishable by imprisonment for more than one year?" To this question, Ms. Tharp circled her answer as "No." When questioning Ms. Tharp at the May 16-17 hearing, the Court mistakenly thought that Ms. Tharp had falsely answered this question. Because Ms. Tharp received deferred adjudication in state court, however, she had not been "convicted" of a state crime and her answer was accurate.

On the reverse side of the juror questionnaire form, which is copied and given to the lawyers for both sides, the juror states her name, age, birth place, city of residence, employer, type of work, and certain other personal and family information, but not her address and telephone numbers. On this reverse side of the juror questionnaire form, the question is asked with respect to criminal actions, "Have you been charged criminally,

other than a traffic ticket?" In response to this question, Ms. Tharp circled, "No." In this answer, Ms. Tharp answered inaccurately because she had been charged criminally with third degree felony theft in state court. Moreover, during the *voir dire* examination of the jury panel, Ms. Tharp wrongfully failed to raise her hand in response to the Court's repeated question, "has any member of the panel ever been involved in a criminal matter in any court that concerned yourself . . . either as a defendant, a witness, or a victim?"[3]

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[3] Defendant also points out that Ms. Tharp technically was a "witness" in her criminal proceedings when she was put under oath at her rearraignment, and again in bankruptcy court when she was sworn to verify her bankruptcy filing, and therefore should also have affirmatively answered the question, "Have you been a witness in Court?" The Court attaches little weight to Ms. Tharp's answers on these questions because jurors tend to think of a "witness in court" as one testifying in an adversarial setting, such as they see on television. Similarly, little weight is given to Ms. Tharp's failure to mention her bankruptcy filing in answer to the juror questionnaire query, "have you sued or been sued?" in civil suite.

> The varied responses to respondents' question on *voir dire* testify to the fact that jurors are not necessarily experts in English usage. Called as they are from all walks of life, many may be uncertain as to the meaning of terms which are relatively easily understood by lawyers and judges.

McDonough, 104 S. Ct. at 849.

It is worth noting that the juror questionnaire forms are filled in by the jurors before the jurors are placed on a panel and sent to a courtroom where they learn for the first time the identities of the parties and the subject matter of the case called for trial. None of Ms. Tharp's arguably erroneous answers to these questions demonstrates or implies any bias against Defendant George Bishop.

At the hearing on May 16-17, Ms. Tharp testified that she now understands her error in failing to respond to the Court's questions about having been involved previously in a criminal matter and the inaccuracy of her answer on the juror questionnaire form as to whether she had been charged criminally. At the hearing, Ms. Tharp unhesitatingly answered all questions regarding her prior criminal activity, her plea, her deferred adjudication, and the terms of her community supervision. When she received deferred adjudication in 1997, she was advised by her lawyer that with deferred adjudication she did not have a conviction on her record and did not need to disclose any conviction on job application forms or the like. She testified that she therefore understood her deferred adjudication status to exempt her from having to answer the Court's questions related to her criminal history and the fact that she had been criminally charged other than with a traffic ticket. Ms. Tharp therefore subjectively and erroneously decided that she did not need to make responses that would have disclosed the felony criminal charge against her, and her failure to make the required responses prevented the parties from learning of her statutory disqualification. Had the statutory disqualification been disclosed during *voir dire*, in all reasonable probability the Government would have moved to excuse Ms. Tharp for cause, which Defendant would have had no basis to oppose, and Ms. Tharp would not have been seated as a juror.

Ms. Josette Robinson has been Ms. Tharp's Harris County Community Supervision Officer for approximately thirty months. Ms. Tharp periodically reports to Ms. Robinson and, after Ms. Tharp was served with the

Court's subpoena to appear for the hearing in this matter; Ms. Tharp reported this development to Ms. Robinson. Ms. Tharp's explanation to Ms. Robinson was consistent with that given to the Court, namely, that when she filled in her juror questionnaire form and sat through the Court's *voir dire* of the jury panel, she did not believe that the questions that would have revealed her criminal history applied to her because she was on deferred adjudication. Ms. Robinson expressed her opinions that Ms. Tharp is in denial about her criminal history, that Ms. Tharp should have known that she was disqualified to serve on a jury, and that Ms. Tharp should have made inquiry of her Community Supervision Officer to determine her eligibility when she received the jury summons.

Whether Ms. Tharp actually believed that her deferred adjudication status exempted her from responding to the pertinent questions set out above, or whether she was in some sort of denial about her criminal activity that prompted her not to respond truthfully out of shame, or a desire to be respected, or whatever, the Court finds from a preponderance of the evidence that Ms. Tharp's failures to respond as required were not motivated by any reason that affected her impartiality and fairness as a juror in this case. Ms. Tharp's inaccurate answers on her juror questionnaire form and her failures properly to respond to the Court's questions on *voir dire* were in no way motivated by any personal bias or prejudice against Defendant Bishop or by any sense of favor for the Government. Ms. Tharp had no bias or prejudice against Defendant Bishop or in favor of the Government when

she answered her juror questionnaire form,[4] when she failed properly to respond to the Court's questions on *voir dire* of the jury panel, and when she was seated and served as a juror. Even Defendant Bishop's counsel at the conclusion of the hearing on May 17 conceded that there is no evidence that Ms. Tharp had actual bias against Defendant Bishop.

Having failed to present evidence from which it could be argued that Ms. Tharp had any actual bias against Defendant Bishop, Defendant advanced the argument that the Court should find that Ms. Tharp had a presumed or implied bias in favor of the Government. Defendant's argument is premised upon first finding that Ms. Tharp is in denial about her past criminal conduct and "refuses to believe who she is," that she therefore desires to prove herself to be an upstanding citizen, that this goal will be realized if others accept her as an upstanding citizen, that service on a jury is a way of achieving acceptance as a "member of the team," and that once seated on the jury she would feel compelled to return a verdict of "guilty" to prove that she is an upstanding person.

Defendant's argument, while innovative and artful, asks too much. This kind of speculative psychology, which piles inferences upon inferences, falls far short of the kind of "extreme" situation – grounded in actual facts – from which bias is legitimately presumed or implied.

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[4] As noted above at page 15, n. 3, Ms. Tharp filled in answers on her juror questionnaire form *before* she was assigned to a panel, sent to a courtroom, or knew anything about the case that would be called for trial.

Examples of the latter were given by Justice O'Connor in her concurring opinion in *Smith v. Phillips*, 102 S. Ct. 940, 948 (1982): "a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction." There are no facts in this case even remotely approaching circumstances from which any bias on the part of Ms. Tharp could be presumed or implied, or that would permit a finding that Ms. Tharp, when seated as a juror, would feel compelled to return a verdict of "guilty." Ms. Tharp had no knowledge of Defendant Bishop before the commencement of the trial, knew nothing about the Government's case, had no bias or prejudice against Bishop, and had no relationship with or connection to any of the parties or their attorneys, including the Internal Revenue Service and the Government, or interest in the subject matter of the prosecution, that had the inherent potential to arouse in a person the kind of emotional involvement that would affect her impartiality.

The Court also examined Ms. Tharp on another of Defendant's speculative theories, namely, whether she had a concern about possible federal income tax liability on the $42,250 that she had stolen in 1997, and hence, whether she might have felt obliged to favor the Government in this case for fear that a failure to do so would subject her to hostile government action on the $42,250. The Court finds from a preponderance of the evidence that Ms. Tharp, who was making court ordered restitution payments of that sum, gave no consideration to the possibility of a tax claim being made against her by the

Government on that sum, and her fairness and impartiality as a juror was in no way affected by such a possibility. In fact, it appeared obvious that even the possibility of tax liability on the stolen funds for which she was making full restitution had never occurred to Ms. Tharp before the question was asked of her on May 17, 2000. Any assertion that Ms. Tharp was encumbered by a fear of an IRS or government prosecution of a civil or criminal federal tax claim against her and therefore felt obliged to favor the United States or to vote for Bishop's conviction has no support in the evidence whatsoever.

The Court also finds that Ms. Tharp never disclosed to others on the jury her own deferred adjudication and that nothing related to her own prior criminal history was improperly injected into the jury deliberations in Bishop's case. Moreover, there is no evidence that Ms. Tharp was in any manner a leader or disproportionately influential in the deliberations of this jury, and such appears highly improbable. The jury was composed of eight men and four women. Ms. Tharp, age 35 at the time, was the third youngest person on the jury. Indeed, most of the jurors were not only older (three were sexagenarians) but were also more experienced than she, and five of them (unlike Ms. Tharp) had at least some kind of previous jury service. Ms. Tharp's formal education, like a couple of the other jurors, culminated with a high school diploma. Nine of the jurors, however, claimed at least some college courses and four had earned college degrees. Included among the latter was the 52-year-old juror who was elected foreperson, an engineering graduate from the University of Missouri, who is a project manager for Shell Chemical Company. The trial itself began October 12,

1999, and four weeks later, on November 10, 1999, the jury retired to begin its deliberations. On that same day the jury returned its unanimous verdict of "guilty" on all three counts. There was substantial evidence justifying an inference of guilt, the verdict was not contrary to the weight of the evidence, and there was no miscarriage of justice. *See* Order entered January 19, 2000 (Document No. 150).[5]

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[5] In his Supplement to Defendant's Motion for New Trial, Defendant alleges that three of the other jurors had had "bad experiences with the legal system and/or the lawyers who operate within that system," and hence, "they wanted to be on the jury . . . because they had an axe to grind against lawyers as a class." The "bad experiences" are presumed by Defendant because a couple of the jurors had been involved in divorce and child support cases and the third was a plaintiff in a groundwater seepage case that was dismissed as barred by limitations. Defendant concedes that these allegations of "anti-lawyer" bias "may not rise to the level of demonstrating actual bias individually." Supplement at 1. Defendant has come forward with no credible evidence of any "anti-lawyer" bias by these jurors individually or collectively that would have had any bearing on their abilities to act as fair and impartial jurors in Defendant's trial. Moreover, the Court specifically inquired of the jury panel if any person had had contacts with a lawyer or lawyers of such a negative nature that it would have an adverse effect on the juror's ability to be a fair and impartial juror in this case against a lawyer. Contrary to Defendant's assertion in his Supplement, the Court was not surprised by the lack of response to this question. Jury duty tends to bring out the best in citizens – not the kind of pettiness or blind bias against all people in a given profession, as suggested by Defendant. Citizens who answer the call to jury duty generally understand the vital importance of their being fair and impartial, and this judge reminds them of it often. Defendant has failed to present any credible evidence of any anti-lawyer bias – actual bias or presumed bias – against Defendant Bishop on the part of any of

After having considered all of the evidence and the totality of the circumstances, the Court finds that Ms. Tharp had no bias or prejudice against Defendant Bishop, nor any bias for the Government's case, and that there are no facts from which any bias or prejudice against Defendant Bishop, or bias for the Government's cases, can be reasonably presumed or implied. Although Ms. Tharp did not answer accurately certain questions on her juror questionnaire form and failed to respond to certain *voir dire* questions asked by the Court – which if answered accurately would have disclosed her statutory disqualification – her reasons for not answering as required were totally unaffected by any actual or presumed bias against Defendant Bishop or for the Government, or any inability on her part to serve as a fair and impartial juror. Defendant Bishop was not deprived of his Sixth Amendment right to a verdict by fair and impartial jurors.

Order

For the foregoing reasons, Defendant's Motion for New Trial (Document No. 174-1) and Supplement to Defendant's Motion for New Trial (Document No. 185) are DENIED. The Government's Motion for an Order Requiring Disclosure and Production of "Client," Client's "Investigator" and Jury Consultant (Document No. 184) is DENIED AS MOOT.

The Clerk shall notify all parties and provide them with a true copy of this Order.

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the jurors, individually or collectively, and the Court finds that there was none.

SIGNED at Houston, Texas, on this 25th day of May, 2000.

/s/ Ewing Werlein, Jr..
EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-20282

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

GEORGE MEREDITH BISHOP, III

Defendant – Appellant

Appeals from the United States District Court for the Southern District of Texas, Houston

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ON PETITION FOR REHEARING

(Filed Oct. 15, 2001)

Before HIGGINBOTHAM and BENAVIDES, Circuit Judges, and LITTLE, District Judge.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:
/s/ Patrick Higginbotham
United States Circuit Judge

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*Chief Judge F.A. Little, Jr. of the Western District of Louisiana, sitting by designation.

28 U.S.C. § 1865. Qualifications for jury service

(a) The chief judge of the district court, or such other district court judge as the plan may provide, on his initiative or upon recommendation of the clerk or jury commission, shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service. The clerk shall enter such determination in the space provided on the juror qualification form and in any alphabetical list of names drawn from the master jury wheel. If a person did not appear in response to a summons, such fact shall be noted on said list.

(b) In making such determination the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grant and petit juries in the district court unless he –

(1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;

(2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

(3) is unable to speak the English language;

(4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or

(5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by

imprisonment for more than one year and his civil rights have not been restored.

RULES OF EVIDENCE

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

* * *

(3) Then existing mental, emotion, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain,

and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

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Rule 804. Hearsay Exceptions; Declarant Unavailable

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(b) (3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

* * *

P.L. 90-274,
JURY SELECTION AND SERVICE ACT OF 1968
Senate Report (Judiciary Committee) No. 90-891,
Dec. 6, 1967 (To accompany S. 989)
House Report (Judiciary Committee) No. 90-1076,
Feb. 6, 1968 (To accompany S. 989)
Cong. Record Vol. 113 (1967)
Cong. Record Vol. 114 (1968)
DATES OF CONSIDERATION AND PASSAGE
Senate Dec. 8, 1967; Mar. 14, 1968
House Feb. 26, 1968
The House Report is set out.

HOUSE REPORT NO. 90-1076
Feb. 6, 1968

THE Committee on the Judiciary, to whom was referred the bill (S. 989) to provide improved judicial machinery for the selection of Federal juries, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill do pass.

PURPOSE

The purpose of S. 989 as amended to provide improved judicial machinery for the selection, without discrimination, of Federal grand and petit juries. Its aim is to assure all litigants that potential jurors will be selected at random from a representative cross section of the community and that all qualified citizens will have the opportunity to be considered for jury service.

HISTORY OF THE LEGISLATION

In the 89th Congress, H.R. 14765 was considered and favorably reported by this committee (see Civil Rights

1966, Hearings before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., second sess., serial No. 16, and H. Rept. 1678). The House approved the measure on August 9, 1966. Title I of H.R. 14765 contained proposed amendments to the Federal jury selection system which were identical in terms of objectives and fundamental principles to S. 989, as amended.

S. 989 was originally drafted by the Committee on the Operation of the jury system of the Judicial Conference of the United States. It was approved by the Conference in March 1967. Hearings were held in the Senate on Federal jury selection in the first session of the 90th Congress (Federal Jury Selection, Hearings before the Subcommittee on Improvements of Judicial Machinery of the Senate Committee on the Judiciary, 90th Cong., first sess.). The measure passed the Senate on December 8, 1967, without objection. In addition to the Judicial Conference of the United States, S. 989 has the support of the American Bar Association and the Department of Justice.

GENERAL STATEMENT

Present law establishes no uniform method for selecting jurors in Federal courts. S. 989, as amended, would impose a measure of uniformity upon Federal jury selection without disturbing local flexibility. The bill clearly defines the roles of judges, clerks, and jury commissioners in the selection process. It eliminates existing statutory vagueness which is a substantial source of confusion in jury selection systems today. The bill also raises juror and witness fees to comport with the rising costs of living and thereby decreases the availability of excuses based on

economic hardship. S. 989, as amended, also specifically makes provision for the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, and the Canal zone, recognizing the special needs of each in the Federal jury selection process.

The committee adopts for its report the Senate committee report on S. 989 (S.Rep. 891) substantially as follows:

S. 989, as amended, embodies two important general principles: (1) random selection of juror names from the voter lists of the district or division in which court is held; and (2) determination of jury disqualifications, excuses, exemptions, and exclusions on the basis of objective criteria only. These principles provide the best method for obtaining jury lists that represent a cross section of the relevant community and for establishing an effective bulwark against impermissible forms of discrimination and arbitrariness.

Random selection from voter lists is not a new method. It has been used by a number of Federal district courts for some years, in part because it can easily be used to produce a large number of juror names. In many districts citizens have complained about the frequency with which they are called for jury service while others, equally qualified, are called infrequently or not at all. Random selection from voter lists should go far toward eliminating these complaints, both because anyone whose name appears on the voter lists has a chance of being selected equal to that of any other listed person, and because voter lists contain a number of names sufficiently

large to insure that no one need be called for more than his fair share of jury duty.

The advantages of random selection from voter lists are not limited, however, to easing the clerks' task in obtaining a sufficient number of jurors or to allocating jury duty fairly among the citizenry. More important, random selection eliminates the key man system and insures that jurors will be selected without regard to race, wealth, political affiliation, or any other impermissible criterion.[1] It is for this reason that random selection traditionally has been the method used to select juror names from the qualified jury wheel. The bill simply extends this principle backward in time to encompass the method used to obtain the names placed in the qualified jury wheel. It thus virtually eliminates the possibility of impermissible discrimination and arbitrariness at all stages of the jury selection process, and thereby tends to insure that the jury list will be drawn from a cross section of the community.

The bill specifies that voter lists be used as the basic source of juror names. These lists provide the widest community cross section of any list readily available. Census data quickly become out of date and are not suitable. The bill requires that the voter lists be supplemented by other sources whenever they do not adequately reflect a cross section of the community. The bill, as amended, provides that sources of names other than voter lists may be used to supplement, but not supplant, voter lists.

The voting list requirement together with the provision for supplementation, is therefore the primary technique for implementing the cross sectional goal of this legislation. The bill uses the term 'fair cross section of the community' in order to permit minor deviations from a fully accurate cross section. The voting list need not perfectly mirror the percentage structure of the community. But any substantial percentage deviations must be corrected by the use of supplemental sources. Your committee would leave the definition of 'substantial' to the process of judicial decision.

If the voter lists are used and supplemented where necessary, and if the procedures outlined in the bill are otherwise rigorously followed it is no departure from the standards of the legislation that the qualified jury wheel, the venire or array, or the jury itself, may not reflect a community cross section. The act guarantees only that the jury shall be 'selected at random from a fair cross section of the community.' It does not require that at any stage beyond the initial source list the selection process shall produce groups that accurately mirror community makeup. Thus, no challenge lies on that basis. In short, the act attempts to achieve its cross sectional aim by insuring that the basic source list is adequate in that regard and that no procedure is employed that would impermissible diminish the likelihood that a cross section will be attained.

In a sense the use of voter lists as the basic source of juror names discriminates against those who have the requisite qualifications for jury service but who do not register or vote. This is not unfair, however, because anyone with minimal qualifications – qualifications that

are relevant to jury service – can cause his name to be placed on the lists simply by registering or voting. No economic or social characteristics prevent one who wants to be considered for jury service from having his name placed in the pool from which jurors are selected.

The second principle – determination of disqualifications, excuses, exemptions and exclusions on the basis of objective criteria only – is designed to work with random selection to produce juries that represent the community fairly. In essence, this principle would prohibit the widespread current practice of imposing qualifications above and beyond those specified by Congress.

Many Federal district courts and officials administering jury selection treat the present statutory qualification requirements – citizenship, age, residence, literacy, health, and lawful behavior – as minimum standards to which may be added subjective notions of 'good character, approved integrity, sound judgment and fair education.' See, e.g., United States v. Hunt, 265 F.Supp. 178, 183 (W.D.Texas 1967). In at least some instances, even though the jury selection officials were well intentioned, these additional qualification requirements have produced discriminatory results, especially in relation to the poor and other minorities. See e.g., Rabinowitz v. United States, 366 F.2d 34 (5th Cir. 1966). Moreover, the committee does not believe that additional qualifications are necessary to obtain jurors with intelligence and good judgment sufficient to understand and render an appropriate verdict. Accordingly, the bill prohibits them. It should be noted, however, that the bill does not change the method of challenging jurors at voir dire. In particular, the bill leaves undisturbed the right of a litigant to exercise his

peremptory challenges to eliminate jurors for purely subjective reasons.

There are some who do not agree with the bill's insistence upon objective qualification criteria. They would authorize the jury commission or the clerk to interview potential jurors in order to determine whether, for example, the ostensibly qualified juror is 'so lacking in intelligence, information, probity, or common sense as to be unable to render satisfactory jury service.' Advocates of such pretrial 'subjective screening' contend that unless it is permitted, random selection of jurors, screened only for objective qualifications, will undermine the quality of jury performance.

All who are concerned with fair jury selection are concerned as well that juries be competent to perform the tasks assigned to them. The jury must be able to listen to the evidence and evaluate it sensibly, to comprehend the instructions given on the governing law, and to make its decisions wisely and honestly. The committee has felt very strongly, therefore, that if juries are to perform satisfactorily, the quality of jurors must be maintained. The committee has approved this bill only upon determining that it includes a number of provisions sufficient to attain high levels of juror competence.

The initial line of defense against incompetence is the requirement that voter lists be used as the primary source of potential jurors. Voter lists contain an important built-in screening element in that they eliminate those individuals who are either unqualified to vote or insufficiently interested in the world about them to do so. But above and beyond that manifestation of interest in the affairs of

citizenship stand the objective qualifications required by S. 989, as amended. A juror must be able to read, write, and understand the English language with a degree of proficiency sufficient to understand and fill out a juror qualification form. In case of doubt the potential juror may be required to fill out a second form in the presence of the clerk or jury commission. The candidate's performance at this point may then be reported to the court. The potential jury must also be able to speak the English language.

The proposed legislation disqualifies those incapable of rendering satisfactory jury service by reason of mental or physical infirmity. The bill also contains some guarantee of 'probity' at least to the extent that persons are disqualified who have charges pending against them for, or have been convicted of, a crime punishable by imprisonment for more than 1 year. Moreover, the 1-year residence requirement assures some substantial nexus between a juror and the community whose sense of justice the jury as a whole is expected to reflect.

The foregoing screens will eliminate virtually all those who ought not to be allowed to serve on a jury – the illiterate, the feebleminded, the insane, the decrepit, the infirm, the accused, and the criminal. But the bill gives judges further powers to eliminate incompetents. Under provisions of proposed section 1866(c)(2) a district judge can exclude those summoned who 'may be unable to render impartial jury service,' or whose service 'would disrupt the proceedings.' And under 1866(c)(5) the judge can exclude those whose service he determines 'would be likely to threaten the secrecy of the proceedings or otherwise adversely affect the integrity of jury deliberations.'

It is intended that 'disrupt the proceedings' include only physical disruption of the proceedings. For example, the 'community drunk' who would be likely to disturb orderly processes in the jury room can be excluded under this criterion. Other possible kinds of disruption are to be dealt with under section 1866(c)(5). A notorious underworld figure who has never been convicted and is currently free from any criminal charge could, under that section, be excluded from a grand jury if his service would be likely to 'threaten the secrecy of the proceedings.' And the hobo who cannot be trusted to appear each day in court might be excluded on the ground that his participation might adversely affect the integrity of jury deliberations.' Section 1866(c)(5) is thus designed to insure that the judge has power to eliminate the rare person who is technically 'qualified' to serve but who is clearly unsuited for such service. Since it is contemplated that these instances will indeed be rare, exclusion under clause (5) is limited to 1 percent of the number of persons who return executed juror qualification forms during the period between two consecutive fillings of the master jury wheel. This percentage limitation will also help to prevent abuse of the otherwise broadly phrased language of the clause.

The provisions for exclusion under these statutory criteria differ in important ways from a system of pretrial subjective screening. These provisions would authorize the exclusion of persons only in the unusual instances and, therefore, in contrast with pretrial subjective screening of every potential juror, they do not seriously threaten the representational goal of the selection process.

Finally, after the foregoing statutory screens have come into play, the proposed bill preserves the traditional right of the parties to challenge a juror for cause or to strike him peremptorily. The eagerness of at least one party to eliminate an unsuited juror cannot be discounted as an effective bulwark against all forms of juror incompetence.

It is possible, of course, that an unsuitable juror will occasionally slip by. But he slips by under present systems of selection and no system of subjective interviews could promise perfection in this regard. Indeed, as noted previously, subjective screening is destined not only to fall short of perfection, but to yield unwanted exclusions as well. Since there is also no empirical evidence that jury competence is dependent upon it, there is no reason to adopt a provision that is likely to impair other goals of the jury selection process.

Accordingly, your committee is convinced that S.989, as amended, contains features that will eliminate virtually every candidate unsuited for service.

But the proposed legislation does not rest with the elimination of the unsuited. The bill also contains provisions that your committee believes will upgrade the competence of Federal juries.

Under the bill, each plan will specify groups whose members may be excused or exempt from service. Although individual hardship excuses will still be possible, the specification of the groups who may justifiably avoid jury service will make it more difficult for members of the community who do not fall within these groups to avoid service on spurious grounds. Many professional

and business people now easily avoid service on the ground that they are 'busy people.' Some will still be able to obtain individual excuses when they are under genuine hardship. But the casual granting of excuses to these presumably more intelligent members of the community will no longer be possible. Enhanced jury performance, as well as an enhanced community cross section, will be the result.

Jury performance will be enhanced as well by closer approximation of the cross sectional goal under the bill. It must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it. As long as there are significant departures from the cross sectional goal, biased juries are the result – biased in the sense that they reflect a slanted view of the community they are supposed to represent.

Therefore, although your committee regards the identification of competent jurors as a fundamental goal of jury selection, it determined that a provision for subjective screening would not constitute wise legislation. In your committee's view, the bill, as amended, contains provisions that fully ensure continuing high levels of performance from Federal juries without any serious risk that other important goals of the jury selection process will suffer.

NO. 765381

THE STATE OF TEXAS
VS.

Jodi Tharp

IN THE 232 DISTRICT

COURT OF HARRIS COUNTY, TEXAS

Change of Venue From: _____

DUPLICATE DUPLICATE

COMMUNITY SUPERVISION ORDER AND
DEFERMENT OF ADJUDICATION OF GUILTY

Judge Presiding: Mary Lou Keel

Date of Order: OCT 13 1997

Attorney for State: Marie McAnulty

Attorney for Defendant: C. Allen Simpson

[ ] Waived Counsel

Offense: Theft – Aggregate

Degree: Third

Date Offense Committed: 02-13-1997 and 04-07-1997

Charging Instrument: Indictment/~~Illegible~~

Plea: Guilty/~~Nolo Contendere~~

Terms of Plea Bargain (In Detail):
10 yrs probation $500.00 fine $42,250.00 restitution

(Circle appropriate selection – N/A = not available or not applicable)

Plea to Enhancement
Paragraph(s): True | Not True | N/A

Findings on
Enhancement: True | Not True | N/A

(Circle appropriate selection – N/A = not available or not applicable)

Affirmative Findings:
DEADLY WEAPON: Yes | No | N/A
FAMILY VIOLENCE: Yes | No | N/A
HATE CRIME: Yes | No | N/A

Sexual Offender Registration Req. Under Art. 6252.13.C.1:
Yes | No | N/A victim's Age: _____

Date Imposed: OCT 13 1997

Costs: $126.50

ADJUDICATION OF GUILT DEFERRED, DEFENDANT PLACED ON PROBATION FOR TEN ~~MOS.~~/YRS. AND A FINE OF $500.00

Time Credited: N/A

Total Amount of Restitution/Reparation/Reward: $42,250.00

Concurrent Unless Otherwise Specified: N/A

Restitution/Reward to be Paid to:

Name: _____

Address: TEXAS COMMERCE BANK 712 MAIN STREET HOUSTON, TEXAS 77002

Statement of Amount of Payment(s) required/Terms of Amount: See terms of probation

This cause being called for trial, the State appeared by her District Attorney as named above, and the Defendant named above appeared in person and either by counsel as indicated above or knowingly, intelligently

and voluntarily waived the right to representation by counsel as indicated above, and both parties announced ready for trial. The said Defendant elected to proceed under Article 42.12, Section 5a of the Code of Criminal Procedure, and in open court, jury having been waived, the Defendant was duly arraigned, pleaded as indicated above to the charge as shown above.

Thereupon the Defendant was admonished by the Court of the consequences of the said plea, and the Defendant persisted in entering said plea; and is plainly appearing to the Court that the Defendant was sane and that he was uninfluenced by any consideration of fear, or persuasion, or delusive hope of pardon prompting him to confess his guilt, the said plea was accepted by the Court and is here entered of record upon the minutes. The Defendant having in open court, in writing, waived the appearance, confrontation, and cross-examination of witnesses, consented to the stipulation of evidence and to the introduction of testimony by affidavits, written statements of witnesses, and any other documentary evidence; and such waiver and consent having been approved by the Court in writing and filed in the papers of the cause, the said plea of the Defendant was received and entered of record upon the minutes.

The trial proceeded before the Court, and after the evidence was submitted and the argument of counsel thereon, the Court found that such evidence substantiates the Defendant's guilt in this cause, and further found that the best interests of society and of the Defendant would be served by deferring proceedings without entering an adjudication of guilt and placing the Defendant on community supervision in this cause as indicated above.

It is therefore CONSIDERED, ORDERED AND ADJUDGED, that in accordance with Article 42.12, Section 5a of the Code of Criminal Procedure, no judgment shall be entered in this cause and that the Defendant be, and he is hereby placed on community supervision in this cause for a period as indicated above, from this date, subject to the attached terms and conditions of community supervision. Further, the court finds the Presentence Investigation, if so ordered, was done according to the applicable provisions of Art. 42.12, Sec. 9, Code of Criminal Procedure.

Deferment of Adjudication of
Guilt/Felony or Misdemeanor
CRM-13 R09-05-95

BILL OF COSTS Tharp

Payment Type: _____ (S, I, D, M or L:) (NOTE: If "I" or "D" see attached order)

Jail Time: _____ _____ H/D/M/Y CC: Y/B _____
Y=Yes N=No (jail/fine/cost concurrent)

Time Assessed TDCJ, (ID) Institutional/(SJ) State Jail; _____ Div: _____ _____ D/M/Y

Jail Credit: _____ _____ H/D/M/Y Sentence to Begin Date: _____

HCJ/SJ) _____ as a Condition of Community Supervision _____ _____ H/D/M/Y

Additional Jail Credit: _____ _____ H/D/M/Y

Payable on or Before: _____ PLO: _____ Reward SPN: _____ COC: _____ Hours of Sentence to be Served by Performing Community Service Defendant to Serve Sentence by Electronic Monitoring? (Y or N): _____

DUPLICATE DUPLICATE

Signed and entered this the _____ day of OCT 13 1997, A.D., 19_____.

Notice of Appeal: _____ 19_____

/s/ Mary Lou Keel
PRESIDING JUDGE

Probation Expires: 10/12 ~~19~~2007

Mandate Received: _____ 19_____, community supervision commences on: _____, 19_____.

Received on _____ day of _____, A.D., 19_____ at _____ o'clock _____ M.

Sheriff, Harris County, Texas

By: _____ Deputy

Entered _____

Verified _____

CRM-13 R09-05-95

CONDITIONS OF PROBATION

THE STATE OF TEXAS

VS.

Jodi Tharp

IN THE 232 DISTRICT COURT
HARRIS COUNTY, TEXAS

CAUSE NUMBER 765381

On this 13th day of October, 1997, you are granted 10 years Probation for the felony offense(s) of Theft-Aggregate, in accordance with Section 5 of Article 4.2.12 of the

Texas Code of Criminal Procedure in the 232 District Court of Harris County, Texas by the HONORABLE Mary Lou Keel, Judge Presiding. Furthermore, it is the order of this Court that you abide by the following Conditions of Probation during the term of your Probation:

(a) Commit no offense against the laws of this or any other State or of the United States;

(b) Avoid injurious or vicious habits including the use of controlled substances and alcoholic beverages. You are forbidden to use, possess, or consume any controlled substances, dangerous drugs, or marihuana unless prescribed pursuant to a lawful prescription;

(c) Avoid persons or places of disreputable or harmful character and specifically _____

(d) Report immediately in person on 10-13-97 to the Harris County Adult Probation Department Intake Division, 19 San Jacinto Street, Houston, Texas and thereafter on the 13th day of each month to your designated Probation Officer unless different dates within a calendar month are agreed to by you and your Probation Officer; Court requires you to report twice a month for 6 months;

(e) Work continuously at suitable employment and notify the Probation Officer within 48 hours of any change in employment status; present written verification of employment (including all attempts to secure employment) once each month on your reporting date;

(f) Permit the Probation Officer to visit you at your home, employment, or elsewhere;

(g) You are instructed to remain within the limits of Harris County, Texas. You are not to travel outside of

Harris County, Texas or change your place of residence unless you receive prior permission from the Court through your Probation Officer;

(h) Support all dependents that you now have or that you may acquire during the probation period;

(i) Submit yourself to random urine specimen analysis by authorized personnel for the Harris County Adult Probation Department, including any department with courtesy supervision jurisdiction; reveal to said authorized personnel proof of any medication legally prescribed for you prior to submitting specimen. A urine specimen positive for any controlled substances, dangerous drugs, or marihuana, not legally prescribed for you, may result in adjudication of guilt or revocation of probation; you are to pay for each U.A. @12.75 each beg. 11-13-97

*U.A. is twice a month for 6 mos.

(j) Refrain from disorderly conduct, abusive language, or disturbing the peace while present at the office of the Harris County Adult Probation Department;

(k) Participate in the Community-based program, _____ beginning _____, faithfully follow all guidelines and instructions until successfully discharged or until further order of the Court;

(l) Participate in a community service program, CSWPP where you are to perform a total of 240 hours, ~~over a period of~~ at 20 hrs per months beginning 11-13-97;

(m) Instead of sentencing you to the Texas Department of Corrections, you are ordered to participate in the Harris County Adult Probation Department's _____ (ISP), and you will continue to participate in this program until released therefrom by order of the Court;

PAGE TWO

CONDITIONS OF PROBATION FOR Jodi Tharp CAUSE NUMBER 765381

(n) Instead of sentencing you to the Texas Department of Corrections, you are committed to the community-based facility, _____ beginning _____. You are to remain in that facility under custodial supervision and comply with all rules, regulations, and contracts of the facility until successfully discharged or until further order of the Court;

(o) Pay a Supervision Fee to the Harris County Adult Probation Department at the rate of $(40^{00}) per month for the entire period of probation beginning 11-13-97;

(p) Make restitution in any sum that the Court shall determine:
Pay $42,250.00 at the rate of $200.00 per month beginning 11-13-97; to $20,000 due on 10-14-97
Texas Commerce Bank
c/o Ray Hooper, Security
712 Main Street
Houston Texas 77002

(q) Reimburse Harris County for Court appointed Attorney Fees in the amount of $_____ at the rate of $_____ per month beginning _____

(r) Pay a fine of $500.00 and Court Costs of $126.50 for a total of $626.50 at the rate of 40.00 per month beginning 11-13-97;

Note: All payments are to be paid through the Harris County Adult Probation Department. Personal checks will not be accepted. In the event supervision of your probation is outside Harris County, Texas, you will be responsible for mailing your payments (money order only) directly to the

Harris County Adult Probation Department, 49 San Jacinto Street, Houston, Texas 77002.

(s) Pay a Laboratory processing fee in the amount of $_____ per month for duration of probation for urine specimen analysis ordered herein commencing the _____ day of _____.

(t) Defendant must observe a curfew from 12:00 midnight until 5:00 a.m., seven days per week until further order of this Court.

(s) Submit yourself to an alcohol/drug evaluation and attend approved treatment program within 60 days directed by the Court through the Harris County Adult Probation Department.

You are hereby advised that under the laws of this State, the Court shall determine the terms and conditions of your probation, and may at any time during the period of probation, alter or modify the conditions of probation. The Court also has the authority at anytime during the period of probation to revoke your probation for violation of any of the conditions of probation.

Signed this 13th day of October, 1997.

/s/ Jodi Tharp
Probationer's Signature

Probationer's right thumbprint

/s/ Mary Lou Keel
Presiding Judge

By /s/ Josette Robinson on 10-13-97
Probation Officer Date

SON #00621616
plea: guilty

CAUSE NO. 765381

THE STATE OF TEXAS	IN THE 232ND DISTRICT
VS	COURT OF
Jodi Tharp	HARRIS COUNTY, TEXAS

ORDER FOR DEFERRED/INSTALLED PAYMENT OF FINE AND COURT COSTS

On this the ___ day of Oct. 13, 1997, 19 ___, the court finds that the Defendant in the above styled and numbered cause is unable to pay the fine and costs in one lump sum, but the Defendant can pay the same fine and costs in installments of $40.00 per month, with the payments commencing on the 13 day of November, 1997 and on the same day each month thereafter until the said total of $626.50 is paid in full.

It is ORDERED that the said Defendant pay the fine and costs in this cause as set out above, and that the said Defendant remain at large as to this cause as long as the said Defendant makes such monthly payments and until the fine and costs are fully paid.

If the Defendant should default on any payments as outlined above, the Clerk is hereby ordered to issue a Capias Pro Fine or the arrest of the Defendant, who shall be committed to jail until the remaining amount of the fine and costs has been paid and satisfied.

It is further ORDERED that the Clerk make this Order a part of the Judgment and Sentence of the above styled and numbered cause and forward a copy thereof to the Sheriff of Harris County, Texas.

SIGNED AND ENTERED on this the ___ day of Oct. 13, 1997, A.D. 19___

/s/ DW 13/998

/s/ MARY LOU KEEL
JUDGE MARY LOU KEEL
PRESIDING
232ND DISTRICT COURT OF
HARRIS COUNTY, TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES	§	
OF AMERICA,	§	**CRIMINAL NO. H-99-153**
Plaintiff	§	**(Judge Ewing Werlein, Jr.)**
	§	
v.	§	
	§	
GEORGE MEREDITH	§	
BISHOP, III	§	
Defendant	§	

ORDER

(Filed May 16, 2000)

Considering the Application of the United States, it is hereby:

ORDERED, in compliance with 18 U.S.C. §§ 6002 and 6003, that the witness, Jodi L. Tharp, shall provide testimony and other information as to all matters about which the witness may be interrogated before this Court; and, that no testimony or other information that the witness provides under this Order and no information directly or indirectly derived from such testimony or other information, shall be used against the witness in any criminal case, except in a prosecution for perjury, giving a false statement, or failing to comply with this Order.

DONE AND ORDERED this, the 16th day of May, 2000.

/s/ Ewing Werlein, Jr.
EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

DEFENDANT'S EXHIBIT 7

JUROR QUESTIONNAIRE

This form helps the court select a jury. Please answer all blanks *in print and in black ink.* If the question does not apply to you. Please write "NA" in it. The lawyers are entitled to information about potential jurors, but if you choose not to answer a question for private reasons, please draw a single line through it.

Name Jodi Tharp

Age 35

Birth Place Baton Rouge, LA

Religious Preference Non-denomination

City of Residence Houston

Years There 10½

Employer (ex if retired) Money Mgmt Int'l

Type of Work Trainer

Years 2

Children's Ages & Sex F-12y M-9y

Grown Children's Type of Work

Marital Status Married

Spouse's Name Kenneth Tharp

Spouse's Birth Place Houston, TX

Spouse's Employer Aerial Viewpoint

Type of Work Pilot

Years 1

List governments that you & relatives have worked for. List law enforcement but not the military.

Who? N/A

Governmental Unit

Type of Work

Have you served in the military? Yes No

Branch & Highest Rank

Years

School Level	School and City	Subject Studied	Degree
High School	Broadmoor High-Baton Rouge La	Business	Yes-82
College			
Post College			

Describe Legal, Para-Legal, or Medical Training or Work:

Civil Suits

Have you sued or been sued? Yes No
Case Type

Have you served on a jury? Yes No
Verdict reached? Yes No
Case Type

Have you been a witness in court? Yes No
Case Type

Criminal Actions

Have you been charged criminally, other than a traffic ticket? Yes No
Case Type

Have you made a criminal complaint? Yes No
Case Type

Have you served on a jury? Yes No
Verdict reached? Yes No
Case Type

Have you been a witness in court? Yes No
Case Type

List the magazines & newspapers you read.

Houston Chronicle

List the civil clubs, socienes, unions and political groups you and your spouse have joined. N/A

If there is a physical or other inability for you to serve as a juror, please describe it. N/A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,	§	
Plaintiff	§	CRIMINAL NO. H-99-153
	§	(Judge Ewing Werlein, Jr.)
v.	§	
	§	
GEORGE MEREDITH BISHOP, III	§	
Defendant	§	

* * *

[5] George Bishop, III came on for trial, I think it was in – was it in November?

MS. LECOCQ: It began in October and ended in November.

THE COURT: In October, began in October of 1999.

THE WITNESS: Yes, sir.

THE COURT: Is that correct? That was after these events had already occurred; is that right? That is, I am referring to your previous conviction on deferred adjudication and to your bankruptcy proceeding.

THE WITNESS: Yes, Your Honor.

THE COURT: I am going to show you what I am going to mark as Court exhibit number 1. Ms. Tharp, this Court exhibit number 1 is the juror information form. It appears to have been signed by you in connection with

your jury service. That is a copy of it, I believe. Do you recognize that copy?

THE WITNESS: Yes, Your Honor, I do.

THE COURT: Is that the – did you fill in that form?

THE WITNESS: Yes, Your Honor, I did.

THE COURT: And did you – is that your signature on it?

THE WITNESS: Yes, sir.

THE COURT: I call your attention to the front page [6] of that. Is there a question there about whether you had had some previous criminal conviction?

THE WITNESS: Yes, Your Honor.

THE COURT: What does that question say?

THE WITNESS: "Have you ever been convicted of a state or federal crime punishable by imprisonment of more than one year?"

THE COURT: And what answer did you give on that?

THE WITNESS: "No."

THE COURT: And is there a question on the back side of that, the other side of that that also asked about whether you have had some involvement in a criminal proceeding, something along that line?

THE WITNESS: I see a criminal complaint.

THE COURT: Charge, criminal complaint other than a traffic offense or something like that. How does that read?

THE WITNESS: "No."

THE COURT: What does the question say?

THE WITNESS: It says, "Have you made a criminal complaint?" Is that the one you are speaking of?

THE COURT: Well, let's look at another one there. Is there another one? Is there one that says under that criminal, "Have you ever been charged criminally other than with a traffic ticket?"

THE WITNESS: Yes, sir, I see that.

[7] THE COURT: Do you see that?

THE WITNESS: Yes, sir.

THE COURT: What did you answer on that?

THE WITNESS: "No."

THE COURT: Now, Ms. Tharp, those answers were not true, I gather, from what you have said; is that correct?

THE WITNESS: I understand that now.

THE COURT: Well, tell me why it is that you gave those false answers.

THE WITNESS: I didn't believe that since I was not convicted –

THE COURT: Well, what do you mean?

THE WITNESS: – that it was applying to me.

THE COURT: What do you mean by that?

THE WITNESS: Since I was on deferred adjudication.

THE COURT: I didn't understand.

THE WITNESS: Since I was on deferred adjudication, I didn't think that it applied to me.

THE COURT: Well, when that question asked about whether you have ever been charged criminally, did you understand that – that you had been charged criminally even though you were then put on deferred adjudication?

THE WITNESS: I was told in the beginning by the lawyer that had represented me that any time I was asked that question, I could deny it, even like on employment

* * *

[9] encounters here in these criminal – this criminal case involving you and the bankruptcy case, out of those proceedings, had you developed some feelings against your lawyers or lawyers on the other side or –

THE WITNESS: No, Your Honor.

THE COURT: Did you have some feelings or views against lawyers generally in any way?

THE WITNESS: No, Your Honor. No.

THE COURT: You remember that not only did this questionnaire come in, but then also I asked a

number of questions of the jury panel on the day the jury was selected? Do you remember?

THE WITNESS: Yes, sir.

THE COURT: And among those questions was a question whether you or any member of your immediate family or whether you had been – I have forgotten how it was put, but something to the effect that –

MR. HARDIN: Page 23, Your Honor.

THE COURT: Something to the effect that if any member of the panel had been involved in a criminal matter in any court that concerned yourself or any member of your family or a close friend either as a defendant – and I explained that the defendant, of course, is the one who is accused of a criminal – a witness, or a victim. And I rather explained that, and then I came back and asked it [10] again before I asked for a show of hands as to whether any member of the panel had ever been involved in a criminal matter in any court that concerned yourself, any member of your family or a close friend, either as a defendant, a witness or a victim. And then I took down the – and asked for a show of hands. And I did not record your hand as having gone up. Did you not raise your hand?

THE WITNESS: No, Your Honor.

THE COURT: And why did you not raise your hand in response to that question?

THE WITNESS: Basically for the same reason. I didn't think it applied to me even in the original answer that I gave you.

THE COURT: And when I came back and repeated it later or asked others if anyone had failed to raise their hand, or if I had not seen anyone's hand, is your answer the same on that as well? Every time I asked the question?

THE WITNESS: Yes, Your Honor.

THE COURT: How could I have asked the question any more clearly to get you to raise your hand?

THE WITNESS: I just didn't think it applied to me. I don't know.

THE COURT: And why is that?

THE WITNESS: Simply because I was on deferred adjudication. I didn't understand that it was still – that

* * *

[33] A. Vaguely, yes, sir.

Q. All right. Do you remember him saying: "Has any member of the panel ever been involved in a criminal matter in any court that concerns yourself, any member of your family or a close friend, either as a defendant – the defendant, of course, is one who is accused of a crime –"

Let me stop there. Now, you, of course, had been a defendant in state court, hadn't you?

A. Yes, sir.

Q. You had been accused of a crime in state court, hadn't you?

A. Yes, sir.

Q. Why didn't you apply that question, which has nothing to do with conviction, why didn't you apply that to you?

A. I looked at the question as being convicted of a crime and I wasn't convicted of a crime. And that is how I looked at the question.

Q. Ma'am, and I am not going to argue with you, I just want to make sure we are clear, do you recall what he said is had you ever been involved in a criminal matter?

Had you been involved in a criminal matter?

A. Yes.

Q. He didn't ask you if you had been convicted, did he?

A. The last part of that statement.

Q. Just the part I just asked you about, he did not ask you [34] if you had ever been convicted, did he?

A. No.

Q. And he said involved in a criminal matter in any court that concerned yourself. You had been involved in a criminal matter in a court that concerned yourself, hadn't you?

A. Yes.

Q. And there is no way to get around the fact that you deliberately decided not to tell him, didn't you?

A. There again, what went on in my mind that day was that I was not convicted of a crime.

Q. He didn't ask you convicted, did he?

MS. LECOCQ: Objection, Your Honor. She is trying to tell him what was in her mind.

THE COURT: All right. I will sustain at this point. Don't argue with her.

MR. HARDIN: All right.

BY MR. HARDIN:

Q. All right. Now, when he told you that either as a defendant – the defendant of course is one who was accused of a crime, you knew you were a defendant who had been accused of a crime, didn't you?

A. In the past, yes.

Q. And that is what he was asking you about was the past, wasn't it?

[35] A. Yes.

Q. So, you knew that he was asking you about whether, in the past, you had ever been involved in a criminal matter as a defendant? You knew that is what he was asking you, didn't you?

A. No, what I though he was asking me, there again, was was I convicted of a crime. And had I been convicted of a crime, I would have come up in front and said I was.

Q. All right. I am going to finish the whole sentence, and tell me if you ever hear anything in this sentence about convicted of a crime.

"The defendant, of course, is one who is accused of a crime; a witness, that is, somebody who may have seen or

be a witness to some part of the commission of a crime who may or may not be called to testify, or may be called to testify by the government or the defense, any kind of witness; or a victim, that is, someone who is the victim of a crime or victimized by criminal conduct."

He doesn't ask you anything in that question, does he, about you having been convicted?

A. No. But there again, I didn't think it applied to me.

Q. Then, what was your reaction to the next question?

"Has any member of the panel, member of your family or close friend, been the subject of an investigation by a state – by an agency of the state or federal [36] government such as the Internal Revenue Service, or have you had a case brought against you in court by state or federal authorities?"

Now, when he asked you that, you knew that you had an investigation conducted on you by the District Attorney's Office in Harris County, didn't you?

A. I'm not sure what you are asking.

Q. Did not you know when he asked you – let me back up.

Did you see a woman named Maria McAnulty out in the hall?

A. No. I mean, I don't know. There was people out in the hall. I don't know her.

Q. Would you recognize the – excuse me. I didn't mean to step on top of you.

A. Other than my Probation Officer, I didn't notice anyone.

Q. All right. Would you recognize the prosecutor who stood next to you when you pled guilty in this case in Judge Keel's court?

A. I don't know if I would or not. If I seen her on the street, I couldn't tell you. I just know it was a lady.

Q. But you knew that you had been investigated and charged, and then pled guilty later to an offense that resulted from an investigation by the Harris County DA's office, right?

A. Yes.

Q. And this question asked you if you have ever been [37] investigated by an agency of the state or federal government, didn't it?

A. I still didn't think that applied to me.

Q. Ma'am, I am just asking you what that language asks. Would you agree with me that that question didn't say anything about conviction, but simply asked you if you had ever been investigated by a state agency?

A. Yes, but I didn't think that it applied to me.

Q. And when the judge said "Or have you had a case brought against you in court by state or federal authorities," you knew you had a case brought against you in court by state authorities, didn't you?

A. There again, I still didn't think any of those questions that applied to me because I was not convicted. That is what I was told.

Q. Nothing I have read you yet, ma'am, talks about convictions, does it?

A. No. But you are asking what is in my mind and what was – about those questions.

Q. So, you are saying that since, in your mind, you hadn't been convicted, that that entitled you not to tell the judge that you had been investigated?

A. I still didn't think that it applied to me.

Q. And you are saying because you didn't think you had been convicted, that entitled you to not tell the judge when he [38] asked you if you had ever had a case brought against you by the state or federal agency, that you were also entitled to not tell him yes in answer to that solely because, in your mind, you were never convicted of that crime?

A. That is what I am telling you.

Q. Okay. Now, the bottom of page 23. Question was asked by the judge now, he gives you that whole question. And then he tells you, "All right. There is a lot in that question and some of you, like I say, may have an answer on one part, some on maybe two or three parts. Some of you may not have anything that requires answering. But I am going to read it to you again now so that you can make sure you have all of the parts in mind."

Then he goes over it again. "Has any member of the panel ever been involved in a criminal matter in any

court that concerns yourself, any member of your family or a close friend, either as a defendant, a witness or a victim?"

Now, Ms. Tharp, now that he is going over it with you the second time, is it still your testimony that you believed you were entitled to not tell him that you had been a defendant in court because, in your mind, you had never been convicted?

A. That is what I am telling you, yes.

Q. But he has still not once asked you anything about conviction, has he?

* * *

[43] you?

A. No, sir. In my job I was a trainer and I didn't think that applied.

Q. That is what I was going to ask you. What were you training them to do?

A. I was training counselors to speak on the telephone, what they could say to creditors, what they could say to customers.

Q. Okay. Now, later do you recall the judge coming back to the criminal matter, I am on page 49, where he said "That long question you will remember is this: Has any member of the panel ever been involved in a criminal matter in any court that concerns yourself, any member of your family or a close friend, either as a defendant, a witness or a victim?" Can you agree with me that it is now the third time the judge has come back to this subject with the panel?

A. I don't remember how many times it was asked, but I do remember him asking that question, yes.

Q. Repeatedly?

A. Maybe twice. I don't know.

Q. All right. You and I have gone across three times. The record will indicate.

Do you remember him now asking the next question: "Again, has any member of the panel, member of your family or close friend been the subject of an [44] investigation by an agency of the state or federal government such as the Internal Revenue Service, but it could be other agencies as well, or have you had a case brought against you in court by state or federal authorities, or do you presently have a claim pending against the United States?"

Do you remember him saying that again as a prelude to then bringing individual members of the panel up to the bench?

A. Yes, it was right before they broke for lunch, yes.

Q. So, would you agree with me that what you remember is that this third time around as he did it, you were now sitting out there in the panel and the whole exercise that was going on is the judge is calling people up to the bench to individually question them concerning whether they or a member of their family or a close personal friend had ever been investigated by a state or federal agency, or whether they had ever been convicted of a crime, or whether they had ever been the subject of investigation by a state or federal agency? You knew, as

you sat out there, that that is what people were walking up to the bench about, didn't you?

A. Yes. There again, I didn't think the question applied to me.

Q. Now, the bankruptcy matter. Did you consider your bankruptcy matter a lawsuit?

* * *

Supreme Court, U.S.
FILED
MAR 21 2002

(2)

No. 01-1060

In the Supreme Court of the United States

GEORGE MEREDITH BISHOP, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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13pp

QUESTIONS PRESENTED

1. Whether petitioner was entitled to a new trial where a juror was found after trial to have been statutorily disqualified from serving on the jury, but the district court found that the juror was not biased against petitioner.

2. Whether testimony offered by petitioner about a statement made by his former bookkeeper should have been admitted at trial.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Dyer v. *Calderon*, 151 F.3d 970 (9th Cir.), cert. denied, 525 U.S. 1033 (1998)	7
Glover v. *United States*, 531 U.S. 198 (2001)	9
Green v. *White*, 232 F.3d 671 (9th Cir. 2000)	7
McDonough Power Equip., Inc. v. *Greenwood*, 464 U.S. 548 (1984)	5, 6, 7
Phoenix Mut. Life Ins. Co. v. *Adams*, 30 F.3d 554 (4th Cir. 1994)	9
United States v. *Baird*, 29 F.3d 647 (D.C. Cir. 1994)	9
United States v. *Collins*, 78 F.3d 1021 (6th Cir.), cert. denied, 519 U.S. 872 (1996)	9

Statutes and rules:

Jury Selection and Service Act of 1968, Pub. L. No. 90-274, 82 Stat. 53	7
26 U.S.C. 7201	2
26 U.S.C. 7206(1)	2
28 U.S.C. 1865(b)(5)	3, 6
Fed. R. Evid.:	
Rule 703	9
Rule 802	3
Rule 803	3
Rule 803(3)	4, 8, 9
Rule 804(b)(3)	9
Rule 804(3)	9

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-32) is reported at 264 F.3d 535.[1]

JURISDICTION

The judgment of the court of appeals was entered on August 29, 2001. A petition for rehearing was denied on October 15, 2001 (Pet. App. 53). The petition for a writ of certiorari was filed on January 14, 2002 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The cover of the petition incorrectly indicates that the court below was the United States Court of Appeals for the Eighth Circuit. In fact, the court below was the United States Court of Appeals for the Fifth Circuit. See Pet. App. 1.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on two counts of willfully attempting to evade federal income taxes, in violation of 26 U.S.C. 7201, and one count of willfully making a false federal income tax return signed under penalties of perjury, in violation of 26 U.S.C. 7206(1). Pet. App. 1-2. Petitioner was sentenced to 18 months' imprisonment, followed by a two-year term of supervised release. Gov't C.A. Br. 2-3. The court of appeals affirmed. Pet. App. 1-32.

1. Petitioner was the sole proprietor of an eponymous law firm in Houston, Texas. Pet. App. 2. He attempted to evade more than $340,000 in federal income tax liability for 1991 and 1994 by diverting business income to personal bank accounts, causing false entries to be made in his business books and records, and concealing information from his accountants and IRS auditors. Petitioner also willfully filed a 1991 individual income tax return (Form 1040) that under-reported his gross income by more than $500,000. Gov't C.A. Br. 3; see Pet. App. 2-5, 19-23. In March 1999, a grand jury returned a three-count indictment against petitioner. *Id.* at 5.

2. During his trial, petitioner sought to introduce testimony that, in October 1996, his then-bookkeeper (who died in 1998) had said that it was her fault that a $400,000 fee petitioner received in 1994 had not been reported to petitioner's tax-return preparer. The bookkeeper also allegedly said that she did not know why she failed to record the fee. Pet. App. 15. Petitioner argued that this testimony went to the bookkeeper's state of mind, intent, and knowledge when filing petitioner's tax return for 1994 and therefore was ad-

missible under Rule 803 of the Federal Rules of Evidence. The government objected that the testimony was inadmissible hearsay not covered by any exception to Rule 802 of the Federal Rules of Evidence, and the district court sustained the government's objection. Pet. App. 15.

3. The jury found petitioner guilty on all three counts of the indictment. Pet. App. 1. After his convictions, petitioner filed a motion for a new trial. Petitioner asserted as one ground for the motion that a juror in his case, Jodi Tharp, was statutorily disqualified from jury service. *Id.* at 6, 33. In 1997, Tharp had pleaded guilty in Texas state court to a charge of third-degree felony embezzlement. The state court deferred an adjudication of guilt and placed Tharp on ten years' probation. *Id.* at 69. The deferred adjudication disqualified Tharp from serving on petitioner's jury. See 28 U.S.C. 1865(b)(5). Tharp, however, failed to disclose her criminal history on her juror questionnaire form and during *voir dire*, and she was seated on the jury. See Pet. App. 5-6.

In May 2000, the district court held a two-day evidentiary hearing on petitioner's motion for a new trial. Pet. App. 42. Tharp testified that she had been advised by her lawyer in 1997 that, because she received deferred adjudication, she did not have a conviction on her record and did not have to disclose a conviction for purposes such as employment applications. *Id.* at 45. Tharp said that, based on her lawyer's advice, she had believed that her responses to questions during petitioner's trial were correct. *Ibid.*

The district court found that Tharp's inaccurate responses were not motivated by any bias against defendant, Pet. App. 46-47, and that "[t]here [we]re no facts in this case even remotely approaching circum-

stances from which any bias on the part of Ms. Tharp could be presumed or implied, or that would permit a finding that Ms. Tharp, when seated as a juror, would feel compelled to return a verdict of 'guilty,'" *id.* at 48. The court further found that Tharp's criminal history was not injected into the jury's deliberations and that it was "highly improbable" that Tharp herself was "in any manner a leader or disproportionately influential in the deliberations" of the jury. *Id.* at 49. The district court accordingly denied petitioner's motion for a new trial. *Id.* at 51.

4. The court of appeals affirmed. Pet. App. 1-32. Among his many claims on appeal, petitioner asserted that the district court violated Rule 803(3) of the Federal Rules of Evidence when it excluded petitioner's proffered testimony about statements purportedly made by the deceased bookkeeper. The court of appeals concluded (Pet. App. 14-15) that petitioner offered the testimony to prove the truth of its contents (*i.e.*, that omission of the $400,000 fee from petitioner's books was not petitioner's fault), not to show the bookkeeper's state of mind, and that the testimony therefore was inadmissible hearsay.

The court of appeals also rejected (Pet. App. 26-32) petitioner's claim that the district court erred in denying his motion for a new trial. The court of appeals held that, in order to obtain a new trial on the ground that Tharp improperly served as a juror, petitioner had to demonstrate that Tharp was either biased or fundamentally incompetent to serve. *Id.* at 26. The court of appeals further held (*id.* at 30-32) that there was no direct evidence that Tharp was biased in petitioner's case, and that this case does not present any "extreme circumstances" (*id.* at 27)—such as a special desire to serve on the jury or a relationship with a participant in

the trial—that would warrant an inference or presumption of bias. The court of appeals also noted that (as the district court had found) Tharp did not reveal her criminal history to the other jurors and "she probably was not particularly influential in deliberations." *Id.* at 31. The court of appeals therefore held that the district court did not abuse its discretion by denying petitioner's motion for a new trial. *Id.* at 32.

ARGUMENT

1. Petitioner principally contends (Pet. 5) that, under this Court's decision in *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548 (1984), he was entitled to a new trial because juror Tharp failed to answer a material *voir dire* question honestly, and a correct response to the question would have been a valid basis for a challenge for cause. Petitioner suggests (Pet. 5-6) that the court of appeals erred by requiring petitioner to provide evidence of bias or of circumstances warranting an inference of bias.

In *McDonough*, a products-liability case, a prospective juror failed during *voir dire* questioning to identify himself as having suffered, or as having an immediate family member who had suffered, injuries that resulted in disability or prolonged pain and suffering. 464 U.S. at 549-550. The juror's son had in fact broken his leg when a tire exploded, but the juror explained after the trial that he did not consider his son's injury to be disabling or to have caused prolonged pain and suffering. *Id.* at 552 n.3. The court of appeals ordered a new trial, reasoning that the juror's failure to respond during *voir dire* concealed evidence of probable bias. *Id.* at 552.

This Court reversed and remanded, holding that the plaintiffs "[we]re not entitled to a new trial unless the

juror's failure to disclose denied [the plaintiffs] their right to an impartial jury." 464 U.S. at 549. The Court noted that "[t]he harmless-error rules adopted by this Court and Congress embody the principle that courts should * * * ignore errors that do not affect the essential fairness of the trial." *Id.* at 553. With that principle as "background," *id.* at 554, the Court held that, in order to obtain a new trial under the circumstances presented, "a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause," *id.* at 556. The Court noted that potential jurors' motives for concealing information during *voir dire* may vary, but it concluded that "only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." *Ibid.*; see *ibid.* (Blackmun, J., concurring) (agreeing with majority "that the proper inquiry in this case is whether the plaintiffs had the benefit of an impartial trier of fact"); *id.* at 557-558 (Brennan, J., concurring in the judgment) ("[T]o be awarded a new trial, a litigant should be required to demonstrate that the juror incorrectly responded to a material question on *voir dire*, and that * * * the juror was biased against the moving litigant.").

McDonough does not support petitioner's claim of error in this case. Even assuming that Tharp did not answer *voir dire* questions "honestly" within the meaning of that case, and even accepting that 28 U.S.C. 1865(b)(5) provided a statutory basis for excluding Tharp from the jury, petitioner is unable to show that Tharp's answers denied him an impartial jury. As the court of appeals noted (Pet. App. 31), the record does not suggest that Tharp in fact harbored any bias, and it

indicates no circumstances that might support an inference or presumption of bias.[2]

Petitioner's claim of a circuit split between the Fifth Circuit and the Ninth Circuit on this issue (Pet. 6) is unfounded. In *Dyer* v. *Calderon*, 151 F.3d 970 (9th Cir.) (en banc), cert. denied, 525 U.S. 1033 (1998), the juror "lied repeatedly" about her brother's death, which occurred under circumstances similar to those in the case she heard as a juror; about her own history as a crime victim; and about the arrest records of her family members. 151 F.3d at 981. The Ninth Circuit found it appropriate under the circumstances to infer that the juror lied in order to be seated on the jury, and that the "extraordinary" circumstances warranted a presumption of bias. *Id.* at 981, 982, 984.

Similarly, in *Green* v. *White*, 232 F.3d 671 (9th Cir. 2000), a juror failed to reveal his felony convictions, including an assault conviction for which he had served six months' imprisonment. *Id.* at 672-673. During the

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[2] The *McDonough* Court did not have before it a situation, such as the one presented here, where the juror's disputed answers during *voir dire* relate to a statutory ground for disqualification that is independent of actual bias. See 464 U.S. at 552 (quoting court of appeals' conclusion that juror's failure to answer question about severe injury "would have been significant and cogent evidence of the juror's probable bias"). Petitioner's argument (Pet. 7) that this case "fits squarely within the two-prong test set out by this Court in *McDonough*" accordingly is incorrect. Moreover, nothing in the legislative history of the Jury Selection and Service Act of 1968, Pub. L. No. 90-274, 82 Stat. 53—on which petitioner relies (Pet. 6)—addresses the circumstances under which a conviction should be overturned based on an allegation of misconduct during *voir dire*. The legislative history offered by petitioner nevertheless does state—consistent with *McDonough*, 464 U.S. at 555—that "perfection" is not required in juror-selection. Pet. App. 66.

trial, the same juror reportedly commented that he always knew the defendant was guilty and that he wanted to shoot the defendant. *Id.* at 673-674. Citing *Dyer*, the Ninth Circuit found that the juror lied to get on the jury, gave false answers to explain his initial lies, and engaged in behavior bringing his impartiality into serious question. *Id.* at 677-678. The Ninth Circuit concluded that those facts together required a presumption of prejudice and a new trial. *Id.* at 678.

Far from disagreeing with *Dyer* and *Green*, the Fifth Circuit in this case expressly relied on both cases as support for its conclusion that bias may be presumed from inaccurate *voir dire* responses "in extreme circumstances." Pet. App. 27; see *id.* at 27-28. But the court of appeals held (*id.* at 30-31) that, in this case, no extraordinary circumstances existed to justify a presumption of bias. That fact-bound conclusion does not warrant review by this Court.

2. Petitioner also challenges (Pet. 7-9) the district court's refusal—which the court of appeals affirmed, Pet. App. 14-15—to admit petitioner's proffered testimony about his deceased bookkeeper's claim of responsibility for omitting the $400,000 fee from petitioner's tax records. That also is a fact-bound challenge that does not warrant this Court's review.

Petitioner first argues (Pet. 7) that the disputed testimony was admissible under Rule 803(3) of the Federal Rules of Evidence, which provides an exception to the hearsay rule for "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed." Fed. R. Evid. 803(3). The court of appeals found that the district court

correctly applied Rule 803(3) because the bookkeeper's alleged statements were being offered "to prove the truth of their content, that is, to show it was not [petitioner's] fault that all or a portion of a $400,000 fee was not reported to the IRS." Pet. App. 15. That factual determination makes Rule 803(3) inapplicable by its terms to the testimony, because the bookkeeper's statements were "statement[s] of memory or belief to prove the fact remembered or believed." Fed. R. Evid. 803(3).

Petitioner's allegation of a circuit split on this point (Pet. 7-8) lacks merit. In *Phoenix Mutual Life Insurance Co.* v. *Adams*, 30 F.3d 554, 566 (4th Cir. 1994), and *United States* v. *Collins*, 78 F.3d 1021, 1036 (6th Cir.), cert. denied, 519 U.S. 872 (1996), out-of-court statements were offered to show the declarant's state of mind, not for the truth of the matter asserted. Rule 803(3) was not considered in *United States* v. *Baird*, 29 F.3d 647 (D.C. Cir. 1994).

Petitioner next asserts (Pet. 8-9) that the bookkeeper's alleged statement was admissible under Rule 703 as information upon which petitioner's tax attorney would have relied, and under Rule 804(b)(3) as a statement against the bookkeeper's interest. Petitioner failed to present those arguments to the court of appeals and the court of appeals did not consider them.[3] See Pet. App. 14-15. Petitioner's new evidentiary arguments, which are fact-bound in any event, therefore should not be considered by this Court. See *Glover* v. *United States*, 531 U.S. 198, 205 (2001).

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[3] Thus, there could not be any merit to petitioner's claim (Pet. 8-9) that the Fifth Circuit's decision in this case conflicts with the decisions of other courts of appeals on the application of Rule 804(3).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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